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THE UNIVERSITY OF ALBERTA

MATRIMONIAL PROPERTY AND THE CONFLICT OF LAWS IN ALBERTA

BY

© MICHAEL BRYAN NIVEN

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

A MASTER OF LAWS

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THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled MATRIMONIAL PROPERTY AND THE CONFLICT OF LAWS IN ALBERTA submitted by MICHAEL BRYAN NIVEN in partial fulfilment of the requirements for the degree of Master of Laws.

.....

Supervisor

.....

.....

This thesis is dedicated to

my parents

ABSTRACT

Matrimonial property is undergoing reform in many countries at the present time. The slow speed of that reform indicates the importance of the issues involved and the central position they occupy in our society. The various studies being made in Canada, and the studies that have been completed, are a microcosm of the greater movement : a movement that, in turn, reflects changing attitudes about the 'place of women' in society and a revision of our sexist conception of roles of spouses in marriage.

We examine the proposals put forward by the Alberta Institute of Law Research and Reform for a deferred sharing regime in Alberta. This study is necessary because our aim is to show some of the conflicts of laws problems that will arise should this regime be introduced for Alberta. A conflicts paper, especially one dealing with matrimonial property, must be clear as to the concepts being dealt with.

We also set out the common law conflicts rules on matrimonial property. We delineate a new approach to characterisation in matrimonial property conflicts and in conflicts generally. Examples are given and discussed of cases that have failed to adopt a realistic characterisation of the issues involved, and of cases that have adopted what we have termed a 'functional characterisation'. Choice of law rules are discussed as well.

The second part of our thesis explores the conflicts of laws problems that will arise should Alberta introduce a deferred sharing regime. We discuss problems of the Alberta regime, in isolation, as it

were - problems of application due to interpretation etc.. We also discuss problems that will arise should the Alberta regime have to interact with the matrimonial regimes of any of the other provinces as they now stand. Our last chapter in this section discusses interaction of the proposals for Alberta with the proposals for Ontario and Manitoba. It is believed that the study of the Ontario proposals is particularly valuable as Ontario will probably provide the example to be followed in matrimonial property reform for many other provinces.

Our concluding chapter explores the possibility of a solution to the problems we have outlined. The basis of our solution is the recent Hague Convention on the law respecting matrimonial property regimes.

They say I shot a man named Grey,

And took his wife to Italy.

She inherited a million bucks

And when she died it came to me.

I can't help it if I'm lucky!

Idiot Wind.....

Dylan.

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TABLE OF CONTENTS

CHAPTER		PAGE
	-PART ONE-	
ONE.	INTRODUCTION.....	I
	I. History of Matrimonial Property.....	I
	II. Matrimonial Property Reform and Private International Law.....	6
	III. Authorities Drawn On.....	9
	IV. Footnotes.....	II
TWO.	THE MAJORITY REPORT OF THE ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM REGARDING MATRIMONIAL PROPERTY.....	I2
	I. Rules of Application.....	I3
	II. Deferred Sharing Inter-Vivos.....	I5
	III. Deferred Sharing Mortis Causa.....	28
	IV. Discretionary Distribution.....	3I
	V. Footnotes.....	36
THREE.	COMMON LAW PRINCIPLES ON THE CONFLICTS OF LAW IN MATRIMONIAL PROPERTY : CHARACTERISATION.....	38
	I. Introduction.....	38
	II. Characterisation.....	39
	III. Methods of Characterisation.....	4I
	IV. Functional Characterisation.....	43
	V. Examples of Functional Characterisation.....	5I
	VI. Footnotes.....	55
FOUR.	COMMON LAW PRINCIPLES ON THE CONFLICTS OF LAW IN MATRIMONIAL PROPERTY : CHOICE OF LAW,.....	57
	I. Marriage Contracts.....	57
	II. Matrimonial Domicile.....	58

CHAPTER PAGE

III. Cases without Marriage Contracts : Static Situation..... 60

IV. Cases Without Marriage Contracts : Dynamic Situation..... 62

V. Limited Mutability..... 64

VI. A Comparison of American and Canadian Treatment of Community Property..... 72

VII. Footnotes..... 75

-PART TWO-

FIVE. APPLICATION OF DEFERRED SHARING : THE HINGE PINS OF IMMUTABILITY..... 79

I. Recapitulation..... 79

II. Residence..... 79

III. Habitual Residence..... 84

IV. Examples of Problem Cases..... 88

V. Interaction of the Divorce Act and the Alberta Regime..... 90

VI. Footnotes..... 92

SIX. APPLICATION OF DEFERRED SHARING : CHOICE OF LAW PROBLEMS..... 94

I. Introduction..... 94

II. Deferred Sharing and the Choice of Law : Foreign Courts..... 95

III. Application of the Common Law Rules to the Choice of Law Problem..... 98

IV. Deferred Sharing and The Choice of Law : Alberta Courts..... 103

V. Some Practical Problems Explored..... 112

CHAPTER PAGE

VI. Footnotes..... I23

SEVEN CONFLICTS PROBLEMS INVOLVING PROVINCES' PROPOSED REGIMES..... I26

I. Introduction..... I26

II. Alberta and Ontario..... I27

III. Alberta and Manitoba..... I33

IV. Some Conclusions..... I35

V. Conflicts Problems Mortis Causa..... I39

VI. Footnotes..... I44

-PART THREE-

EIGHT SOLUTIONS TO THE CONFLICTS PROBLEMS POSED..... I46

I. Introduction..... I46

II. How a Solution Would Become Effective..... I46

III. The Form of a Uniform Conflicts Rule..... I52

IV. The Hague Convention..... I57

V. Conclusion..... I73

VI. Footnotes..... I75

TABLE OF CASES..... I77

BIBLIOGRAPHY..... I80

PART ONE

In this, part one of our thesis,we will attempt to set the stage for our consideration of the conflicts problems that will arise should Alberta introduce a deferred sharing regime. The Introductory chapter gives a history of matrimonial property in various jurisdictions,including Canada and England. Our second chapter describes the proposals put forward for a deferred sharing regime in Alberta. No study of the conflict of laws in matrimonial property can hope to be successful unless one is sure of the kind of regime one is dealing with. The cases are bedevilled by loose usage of terminology that clouds basic issues, such as characterisation. Our description of the substantive parts of the proposals is accompanied by a certain amount of comment. Where this comment is not directly related to our field of study it may be of interest to show other problems that may arise with the proposed regime.

Our third and fourth chapters set out the common law rules that obtain in relation to matrimonial property conflicts. A substantial part of this discussion is devoted to characterisation. Our study, as far as it relates to Canadian jurisprudence on the subject is, of necessity, somewhat inconclusive, due to the lack of relevant cases. Our aim in this section was not to reach a conclusion where lack of data made a conclusion pointless, but to ask relevant questions and set out some of the

answers that have been considered for these questions.

CHAPTER ONE

INTRODUCTION

I. History of Matrimonial Property

It is perhaps axiomatic to remark that the law on matrimonial property is undergoing change in practically all of the Western world. A general dissatisfaction with the way in which the law assigns ownership of property between the spouses has led many countries to consider how their laws on marital property may be adapted in order that the law may take greater account of social reality.

It is the intention of this introductory discourse to take an overview of this ferment, and to set the stage, as it were, for our consideration of the moves for reform that are being made in Alberta and in the rest of Canada. We shall also attempt to show how the reform of matrimonial property law has significance for private international law. It will be shown that our study is valuable for a number of reasons, both practical and academic.

One of the first countries with a civil law or Romanist system to reform its matrimonial property law, was France. The law of July 1965 aimed at "a sweeping reform of the French matrimonial property regime". Prior to 1965 France had, as its legal regime, or as the system that applied between spouses in the absence of any agreement to the contrary, what is usually described as community of property. Community of property was a complex system of co-ownership between the spouses of certain classes of assets. Certain classes of assets were exempt from the community, and there were elaborate provisions respecting administration of

the various classes of assets. The pre-1965 regime had its medieval origins in the customs of France, and had evolved from a system where the husband really had control of all of the property of both spouses, to the stage where the husband and wife were almost equal partners as far as their matrimonial property was concerned. The pure structure of the legal regime had been amended over the years to take account of the emancipation of married women, but its origin and theory left many dissatisfied. Many couples preferred to contract for a conventional regime that would reflect the equality between the partners, or even for separation of property. It was felt that the time had come to adopt a new system as the one that would apply automatically. The law of July 1965 introduced community of acquisitions as the legal regime. The husband was still vested with administration of the fund in community but now he must get his wife's consent to all important transactions. His power of free administration may now be regarded as exceptional. Each party has full power of control over his or her own assets, i.e. those not included in the community.

The movement for reform of the matrimonial regime in France was really aiming at complete separation of property, and the new legal regime may be regarded as something of a compromise between community and separation of property. Indeed, the new regime has been described as "a fraud," in that although it is described as a community property regime it is, in essence, one of separation.

The process of reform of matrimonial property law in a common law jurisdiction may also be outlined to show the same process of reform as was identified for France, taking place in the opposite direction.

The thrust of the English Married Women's legislation of the late I9th and early 20th century was to make married women separate as to property. The general rule became that marriage, of itself, had no effect on the property relations of the parties. 'Separation of property', however, while it may be fair in theory, is manifestly unfair in practice. For a detailed account of the injustice that may be caused to a non-earning spouse (typically the wife) reference is made to the introductory sections of the various reports by the provinces on matrimonial property reform. Basically the injustice is caused by the fact that as it is the husband who earns the money with which assets for the family's use are acquired, when the time comes to say who owns what, these assets will stand in the husband's name. The wife may have worked equally hard at home, but this fact is not significant under a system of separation. Couple this with the fact that a wife's position on the labour market will be much less strong than that of her husband after, say, twenty years of child raising, and one can see that there is a strong case for giving her property rights in the assets that have been acquired by the couple during married life together.

The English courts tried to rectify the inequitable position of the wife (or at least of the non-earning spouse) in a series of courageous decisions during the I950's.[3] The attempt to give the homemaker an equity in 'matrimonial assets' was, however, defeated by the House of Lords in the landmark cases of Pettitt v. Pettitt[4] and Gissing v. Gissing.[5] These cases established that there was no basis in law for giving a non-contributing spouse a share in what were erroneously termed 'matrimonial assets' in the absence of an intention to share; difficulty in assessing that share, given the necessary intention, did not justify application

of the maxim 'equality is equity'.

One can trace a similar attempt in the Canadian common-law courts at rectification of the inequality of separation.[6] The courts of Alberta,[7] British Columbia,[8] Manitoba,[9] and Saskatchewan all have decisions that seek to interpret the common law of separation, and the English cases, as favourably as possible to a doctrine of matrimonial assets. The Supreme Court of Canada in Thompson v. Thompson[10] stated that the better course would be to introduce sharing of matrimonial assets by legislation rather than by "the exercise of immeasurable discretion under [the equivalent of the English section 17 of the Married Women's Property Act][11]".

The Supreme Court of Canada finally put an end to any attempt at rectification of the law by 'judicial legislation' in Murdoch v. Murdoch.[12] The ratio of Gissing and Pettitt was applied by the Supreme Court and the full force of separation of property restored. This decision received wide publicity and was at least partially responsible for the agitation for reform.

England's system of separation of property has been somewhat tempered by a statutory system of discretionary distribution of spouses' assets on the dissolution of marriage. Deferred sharing was examined by the Law Commision of England but no form of matrimonial property has been introduced yet.

As for the Canadian common law jurisdictions, some have already started the process of reform, most are still considering proposals by the various law reform bodies. Most are examining the feasibility of deferred sharing, which is a system which could be described as mid-way between full community of property and separation of property. While

with community of property, the goods to be shared - the shareable assets - are owned jointly during the lifetime of the parties, with deferred sharing, each party is separate as to property until the time comes to divide the shareable assets. Each party is practically free to deal with his or her own property as he or she pleases. There are certain restrictions on the power of free alienation to prevent one party divesting himself of all of his property in order to defeat the claims of the other spouse at the time of the dissolution of the marriage.

Deferred sharing, or participation in acquisitions, as it is variously called, has been introduced in other countries such as West Germany and Sweden. It is the system that was introduced in Quebec in 1969 [13] as the new legal regime. This system has found favour in so many jurisdictions, and is likely to be the one enacted, for at least some of the provinces of Canada, because, it is submitted that it is the one which does the best job of "reconciling the degree of separation necessary for the economic independence of spouses who work, with the desire to pool the fruits of their work" [14].

It is the strain between these competing objectives that has led many common law jurisdictions to consider some form of community and that has led many community property jurisdictions to blend in a degree of separation. The reforming processes going on in each type of jurisdiction may be seen as aiming at, or working towards, a central position where the conflicting desires outlined above will be reconciled - each system coming to that central position from opposite ends of the spectrum.

It is believed that deferred sharing is probably about as close to the ideal central position as one can get. It is not the perfect

system. No system or rule can hope to regulate perfectly a relationship as complex and as varied as that enjoyed by married couples. It may have certain drawbacks, and improvements on the system as enacted elsewhere, should always be considered.

I5

II. Matrimonial Property Reform and Private International Law

The drawing together of the systems of separation and community raises interesting problems for the student of private international law. It was relatively easy to identify the kinds of rights that a spouse had under separation of property and under community of property, as that term was traditionaly understood. Under separation of property a spouse, by and large, acquired no rights in the property of the other spouse by virtue of the fact of marriage. Therefore, on a change of home, no rights needed to be carried forward and taken account of under a new legal system. Under the traditional civil law community a spouse generally had rights of ownership in the community property. Therefore, on a change of home, these rights would be carried forward and would be recognised under the new law. When one is dealing with a hybrid system however, it may not be so easy to identify rights, as they are traditionaly understood, or the lack of them, in the assets which are to be shared. On a change of home, therefore, it becomes more difficult to say what significance spouses' contact with a deferred sharing regime has. The rights they may have had under the deferred sharing regime of a former home may not be 'vested' as that term is traditionaly understood. How, therefore, are the expectations of the spouses to be fulfilled?

The problem is really one of characterisation - characterisation or classification of the interest that spouses may have had under def-

erred sharing. Our study will seek to show how problems of classification, when deferred sharing regimes, and other systems of matrimonial property, are being dealt with, may be approached.

The study of the introduction of community elements into common law jurisdictions is interesting to the conflicts student for other reasons. While the common law system of separation of property gave spouses no rights in each others' property by virtue of the fact of marriage, the common law jurisdictions did try to compensate for this by giving a spouse, particularly a wife, extensive rights to the other's property, on that other's death. The idea of sharing mortis-causa was even allowed to overlap, as it were, into the situation where marriage was dissolved inter-vivos of the two spouses, in some jurisdictions. An interesting example of this existed in Scots law. On divorce, the innocent party might claim the rights that they would have been entitled to if the marriage had been dissolved by the partner's predecease. I6

In community jurisdictions the idea of sharing the community, and succession rights, were always combined. We will see later that the small succession rights (as that term is understood in the common law) accorded to a French or Quebec widow, are explainable by the extensive rights she has in the community property on dissolution of the marriage by death.

It is clear that the legislative intention of community systems on dissolution of marriage by death is largely matched by the succession rights of the common law. The introduction of deferred sharing into common law jurisdictions may lead to overlap in the area of succession and dissolution on death. While duplication of the rights given to a

surviving spouse may be taken account of within the context of a domestic system, the fact that different legal systems may be used, under traditional conflicts rules, to decide matrimonial property rights and succession rights, gives rise to serious conflicts of laws problems. These problems can only be solved by a new approach. We will attempt to delineate that approach.

It is believed that our study of the conflicts of laws problems that will arise should Alberta introduce a deferred sharing regime, is valuable on two levels. The first level is that of immediate practical value; by exposing some of the problems in advance of enactment of a deferred sharing regime, the problems may be taken account of by the legilators and avoided. Our study may do no more than indicate that problems of private international law will arise. If, as vulgar parlance would have it, 'we raise the consciousness of the legislators conflicts-wise,' we will have achieved something worthwhile.

The second level relates to the value of the study as an academic exercise. The introduction of community elements into the common law of Alberta has certain implications for the conflict of laws that we have already outlined. These implications lead us into a consideration of some of the most basic aspects of the conflicts of laws. Characterisation has been mentioned.

Characterisation problems are often the unrecognised basis of many cases with relevant foreign elements. DICEY puts it well when he tells us that "English law is relatively rich in cases raising questions of characterisation, but poor in judicial discussion of the problem". How much more true of the law of Canada and Alberta, where even fewer

[17] [18]

conflicts cases, let alone cases dealing with characterisation issues, reach the case reports.[19] Our study gives us a way into areas that raise characterisation problems and the opportunity to discuss how these problems might be approached.

Matrimonial property generally may be considered one of the most interesting areas of conflicts of laws. Characterisation was first recognised as the result of a marital property case in the nineteenth century.[20] Other matrimonial property cases figure as landmarks in the jurisprudence of characterisation.[21]

Matrimonial property cases also raise another issue fundamental to the conflicts of laws: the old mutability v. immutability controversy that runs through much of what will follow, really comes down to the question of when do people cease to be governed by a law that they have lived under in the past, and when do they form a significant connection with the law of a jurisdiction that they move to?

III. Authorities Drawn On

In our study we have borrowed extensively from the decided cases, and the juristic writings, of Scotland, the United States and England. It may be considered strange that, for a country with a system of community property already in operation in one of the provinces, a relatively liberal divorce law and a high degree of inter-provincial mobility there are so few cases on the conflicts problems that can arise in relation to matrimonial property. It may be that the expense of conflicts litigation leads to many cases being settled out of court. In any case, the paucity of reported decisions makes our borrowing from foreign sources necessary. It also gives us an insight into the ways in which

other jurisdictions may handle the problems that are yet to confront the common law provinces of Canada.

On the other hand, Canada may be considered fortunate to be in such geographical, and perhaps jurisprudential, proximity to a country that has been described as a "conflicts of laws laboratory, a uniquely favourable setting in which to observe - and to reflect upon the problems of private international law". Fortunate indeed, for Canada may take the fruits of the experiments without having to pay the price of research in judicial time and public money.

Footnotes to Chapter One

I. Neville Brown, The Reform of French Matrimonial Property Law, (1965) 14 Amer. J. Comp. Law 308. per Mazeaud, D. 1965, Chron. 92.

2. Brown, supra, at 321.

3. Rimmer v. Rimmer [1953] 1 Q.B. 63, Jones v. Maynard [1951] Ch. 572, Appleton v. Appleton [1965] 1 W.L.R. 44, (C.A.).

4. [1970] A.C. 777 (H.L.).

5. [1971] A.C. 886 (H.L.).

6. Stanley v. Stanley (1960) 30 W.W.R. 686 (Alta. S.C.).

7. Sopow v. Sopow (1958) 24 W.W.R. 625 (B.C. S.C.), c.f. Re Stajcer and Stajcer (1965) 34 W.W.R. 424 (B.C. S.C.).

8. Germain v. Germain (1969) 70 W.W.R. 120 (Man. Q.B.).

9. Eberle v. Eberle (1973) 12 R.F.L. 268 (Sask. Q.B.), c.f. Rathwell v. Rathwell (1974) 14 R.F.L. 297 (Sask. Q.B.).

10. [1961] S.C.R. 3, 26 D.L.R. (2d) 1.

11. [1961] S.C.R. 3 at 13 per Judson J..

12. [1975] 1 S.C.R. 423, (1974) 1 W.W.R. 361.

13. Statutes of Quebec 1969 Ch. 77, An Act Respecting Matrimonial Regimes.

14. Marc Ancel, Matrimonial Property Law in France, in Friedmann's Matrimonial Property Law (1955) 1 at 28.

15. Hahlo, A Note on Deferred Community of Gains : The Theory and the Practice, (1975) 21 McGill L.J. 589.

16. Clive and Wilson, Husband and Wife, (1974) at 286.

17. Dicey and Morris, The Conflict of Laws, 9th edn. (1973)

18. Dicey, supra, at 30.

19. See Chapter 3, footnote 7.

20. Anton v. Bartolo, Clunet (1891) 1171. See Bartin, 1897 Clunet 225. This case is popularly known as "The Maltese Marriage Case".

21. De Nicols v. Curlier [1900] A.C. 21 (H.L.), Lashley v. Hog (1804) 4 Paton 581.

22. Von Mehren, Conflict of Laws in a Federal System : Some Perspectives, (1969) 18 I.C.L.Q. 681 at 685.

CHAPTER TWO

THE MAJORITY REPORT OF THE ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM REGARDING MATRIMONIAL PROPERTY

In 1971 the Institute of Law Research and Reform was asked by the Provincial Legislature of the Province of Alberta to carry out a study on "the feasibility of legislation which, upon the dissolution of marriage, would give each spouse the right to an equal share in the assets accumulated during marriage other than by gift or inheritance from outside sources."[1] The report of the Institute was published in August 1975 after various preliminary steps which included a survey of married couples' ownership of property. A working paper was also circulated with a questionnaire. Submissions were taken from a wide range of interested organizations.

The Report falls into the following parts: after an introduction and canvass of the existing law of matrimonial property the proposals for change are put forward. The Institute was divided as to what would be the best alternative to the present system. Four of the members of the Board set up to deal with this area recommend introduction of a "deferred sharing regime". Three of the members of the Board recommend introduction of a judicial discretion to divide property of the husband or of the wife, or of them both, on dissolution of the marriage and upon certain other events. It is the intention of this chapter to delineate the features of the majority report and, more especially, to identify those aspects of the recommendations that have special significance for

the conflict of laws.

I. Rules of Application.

It should be made clear at the outset that the majority report really involves two distinct proposals. One of these proposals is intended to apply to couples already married and living in Alberta. The other proposal is intended to apply to couples who are not married and living in Alberta but who marry after the legislation is enacted and live in Alberta, and to couples who are already married and who come to live in Alberta after the legislation is passed. We perceive at once, therefore, a rule of application fundamental to our study. What are the policy reasons for such a differentiation?

> The proponents of the majority system accept the principle that a husband and wife should share the economic gains which they make. They think, however, that it should not apply to couples already married and living in the province. The retroactive interference with the mutual rights and obligations of the husband and wife would in their opinion be too harsh if it is automatic.[2]

In the case of couples already married and living in the province at the time the recommended legislation is passed, the Board proposes that the court be given a discretionary power of distribution not unlike that which is recommended by the minority proposal.

Why does the Board feel justified in applying its deferred sharing regime to couples already married and coming to the province? Cogent arguments are put forward against such a proposal; the fact that it would be as unfair to couples coming to Alberta to interfere retroactively with their matrimonial property rights as it would be in the case of couples already married and living in the province, and the

possibility that it would discourage "people with money"[3] from settling in the province. However, the Board feels that "The couple move to Alberta by choice and should be taken to have accepted the law of Alberta."[4]

It is felt that the Board is not justified in applying a double standard in this regard. Couples from other provinces, or from outside Canada, should not be treated differently from those already married and living in Alberta. To say that by coming to Alberta they must be taken to have chosen to come to Alberta, is to ignore a host of economic and other pressures that may well have played a decisive part in the decision to move. Such a statement also tends to show a disregard of the fundamental object of private international law which is to do justice between parties in spite of the territorial limitations of domestic legal systems.

The Board does, however, temper its proposal by allowing a couple coming to Alberta to agree that the sytem of deferred sharing should not apply to them (a rather unrealistic suggestion in light of the fact that few couples address their minds to the problems of matrimonial property, let alone enter into a legal agreement on the subject) and by stipulating that

> the court should have a special discretion to vary the shares of the couple if it would be reasonable to infer that they would have ordered their affairs differently if there had been a deferred sharing regime applicable to them earlier.[5]

While such a power in the court may or may not be workable, it is felt that it does put on the court the onus of finding the sort of non-existent intention with regard to matrimonial property that most couples

have.

The problem of application of the proposed statute and the proposed solutions, quite apart from the criticisms with regard to policy levelled here, do have serious implications for the conflict of laws. The conclusion of the majority of the Board is

> that a system of distribution of gains by judicial discretion should apply to couples already married and habitually resident in Alberta, and that a system of deferred sharing should apply to those who establish a common habitual residence in Alberta after the new law comes into force[6]

We will now examine the import of these terms;"distribution of gains by judicial discretion" and"deferred sharing".

II. Deferred Sharing Inter-Vivos.

The essence of deferred sharing entails each spouse being separate as to property during married life together, in much the same way as they are at present under the law. There would be means by which one spouse could prevent the other from alienating all his or her property in order to defeat the first spouse's claim. On breakdown of married life or on dissolution of the marriage the spouses would share the economic gains each of them had made during married life together.

A lot of time could be spent setting out the minutae of the report. This would not be a worthwhile exercise as all the proposals and recommendations are clearly set out in the report itself. In the present context a broad brush is a more useful tool, and only those proposals which are considered the most germane to this thesis will be drawn in detail or highlighted with comment.

During marriage each spouse would be separate as to property.[7] This distinguishes the Institute's proposed regime immediately from what are commonly called "community property regimes", where property of the spouses may be co-owned or held in common. The Board felt that the advantages of giving each spouse a present property right in the assets of the other would be outweighed by the administrative problems consequent to the introduction of such a system, and by the fact that people are unused to such a system.

> Upon dissolution or breakdown of marriage during the lifetime of both spouses they shall share the economic gains made by them during the marriage.[8]

The economic gains of the couple are defined to exclude property owned by either spouse at marriage, or received subsequent to marriage by virtue of a gift or inheritance from a third party.[9] Stress is laid on the partnership aspect of marriage. That which is accumulated due to the efforts of each spouse is usually only got due to the indirect help of the other spouse. This principle is again illustrated by the recommendation that debts be shareable between the spouses.[10] The bad must be taken with the good.

Provision is made whereby spouses may agree not to be bound by the regime. Such an agreement may be entered into either before or after marriage. If made during marriage, and while the couple are subject to the regime, the court must approve of the fairness of such an agreement to terminate the regime. Only when the approval of the court is given can the regime be said to have been terminated.

A couple may agree before marriage that the regime is not to apply to them. Such an agreement must be in writing and it must contain an

acknowledgement, taken before a Commissioner of Oaths, that the spouse whose right to receive a share of the other spouse's goods is affected, understands that he or she is losing that right by virtue of the agreement and that he or she is a party to the agreement by his or her own free will.[11]

Similar provisions for contracting out of the statutory regime are proposed in respect of couples already married who, subsequent to the passing of the new law, move to Alberta and who, in the absence of an agreement to the contrary, become subject to deferred sharing. Apart from the rules designed to prevent overreaching, the Board recognises that if a husband and wife make an agreement with respect to their property before they move to Alberta, and if that agreement is valid by "the law to which they were subject when it was made" the law of Alberta should recognise it.[12]

An interesting point may be broached at this point. Can an agreement not to be bound by the proposed regime for Alberta be implied from the fact that, in the case of a married couple coming to live in Alberta after the passing of the proposed legislation, at the time of the marriage it is presumed that the couple intend their property rights to be governed by the law of the husband's domicile? Can the presumption of what may be the common law choice of law rule imply an agreement to exclude application of the Alberta regime?

This question brings us, it is submitted, into the conflicts of laws controversy usually known as the mutability versus immutability argument, a controversy that will be addressed squarely in the succeeding chapter. Applying that controversy to our case, we may ask if the fact

that a husband's domicile at the time of marriage is taken to rule on the property relations of the spouses at the time of marriage (a rule which is partly predicated on the assumption that this will be the actual matrimonial domicile, as the parties would, under once popular ideas move to the husband's domicile on marriage) mean that that law should always govern the parties' property relations, even after a change of domicile?

The answer to our question regarding exclusion of the regime by implied agreement will depend on our conclusion to the mutability and immutability controversy. We will make a few comments at this stage however, as the matter is rather fundamental to our study.

It may be that the answer to this problem will depend on the the type of matrimonial property regime the couple lived under in their old home. We will see later that there is a tendency in civil law countries, such as France or Quebec, to ascribe to couples who marry while domiciled in these countries, or while the husband at least is domiciled there, an agreement that the matrimonial property regime of that jurisdiction shall apply to them. This idea of a tacit contract is not one which is given much play in the jurisdictions that apply separation of property to married couples. We will argue, however, that while the idea of a tacit contract may have validity in the domestic context it is not a concept that should have any bearing on the choice of law process.

It may also be that as far as the provision being dealt with here is concerned, the use of the tacit contract approach involves a degree of circularity. It may be valid to allow spouses' affairs to be governed by an agreement which was valid by the "law to which they were

subject when the agreement was made". The agreement or contract has some independent existence. While the phrase "law to which they were subject" admits an indefinite number of laws because there is no connecting factor to limit the law chosen as the touchstone of validity, a contract may indicate the law which is to govern it. The fixing of the proper law of a contract is a common occurence in private international law.

It is less defensible to reason thus: The spouses once lived under a law or in a jurisdiction that held that community of property applied between the spouses by virtue of an implied contract; the spouses' affairs should be governed by that law because the agreement is valid by that law. It is submitted that this is the same as saying that the law which imposes a tacit contract will be applied because that law holds such a tacit contract valid. By this process one is resolving the choice of law process by reference to the law chosen. That is circular.

It is submitted in any case, that the wording of the report (i.e. if the spouses "make an agreement") indicates that something more than an agreement implied by law would be required to exclude application of the Alberta regime.

In making an agreement with respect to their property a couple may stipulate all the rules that are to regulate their relationship or they may merely vary aspects of the statutory regime. They may agree to be subject to the discretionary regime primarily recommended for couples already living in Alberta before commencement of the new legislation.

Once a couple are subject to the deferred sharing regime it

requires a court order to terminate the regime. Such an order may take the form of another order of the court terminating the marriage or ordering judicial separation. What should be emphasised is that judicial intervention is always required to end a regime.

The first instance of regime termination described by the report is that which follows a joint application of the spouses. This is the procedure already described where a couple agree to end the regime and seek judicial approval. The court will, on being satisfied that it is "fair and just to terminate the regime"[14] so order. Gains of each spouse up to termination and since the time of the marriage are shared on termination. This process may be distinguished from an agreement not to be bound by the regime which must be made before marriage and which prevents commencement of the regime. An ante-nuptual agreement (or in the case of an agreement made by a couple coming to Alberta, an agreement made before acquiring a common habitual residence in Alberta) will rule on the disposition of post-nuptual acquisitions.

The instances where a spouse may unilaterally apply for a termination are specified in the report. If one spouse "makes substantial gifts or transfers substantial amounts of property for an inadequate consideration"[15] then the other spouse may apply for a termination order. Such an entitlement also arises where one can show an intention to make such gifts or transfers and where it is felt there is "undue risk that the other spouse will dissipate or lose property to the detriment of the applicant".[16] There seems to be no machinery contemplated in the majority recommendation for unilateral application for termination for any other reason.

The deferred sharing regime is intended to effect the sharing of the economic gains of spouses made during their life together. The court is therefore given power to order sharing of these gains and thereby terminate the regime when that life together ends. If the spouses have been living apart for at least a year and if the court is satisfied that normal cohabitation between the spouses has ceased, termination may be ordered. The underlying function of deferred sharing is again shown by the recommendation that the court may exclude from the shareable gains of a spouse any gain made while the spouses were living apart.[17]

The regime will end when the marriage of the spouses ends. A spouse would be entitled to apply for a balancing payment at the time of a decree of divorce or of nullity or at the time a void marriage is declared null.[18] A balancing payment may also be applied for at the time of a decree of judicial separation.

The report envisages that the right to apply for a balancing payment would lapse one year after the right to apply for it arose. This provision, is of course, designed to prevent a long period of uncertainty between the couple as to their property. While recognising it would be highly desirable if the balancing payment was ordered at the time of the decree of divorce, nullity etc., an exception is allowed in the case where a person entitled to apply for the balancing payment at the time of the decree did not know of his or her right to apply at that time. In the normal case the balancing payment would be ordered just before the final decree of divorce or before the final judgement in proceedings for nullity or judicial separation. In the case where the person entitled to apply did not know of the right to apply, the right

to apply would continue for one year after the date of judgement. As the report points out, if the person bringing the court proceedings that are the occasion for termination wishes to have his or her property rights decided once and for all at these proceedings, it will be in that person's interest to inform the other spouse of the right to apply for a balancing payment.

It will be appreciated therefore, that the ordering of a balancing payment by the court in the various situations described above is tantamount to a declaration that the regime is terminated. Apart from the special case of a spouse ignorant of his or her rights, the right to apply for a balancing payment disappears upon termination of the regime. It is clear that the statutory regime terminates upon the happening of one of the following events: Decree absolute of divorce;Decree absolute of nullity of a voidable marriage;Declaration of nullity of a void marriage;Judgement of judicial separation;Judgement for a balancing payment or for a transfer of property in lieu thereof;Approval by a court of a renunciation of a regime or of a settlement of a claim for a balancing payment.

It would be useful at this stage to describe how the balancing payment is calculated. Although the Board recognises the principle of equal sharing they feel that some regard should be had to the respective merits of the husband and wife involved. It is recognised that it would be impossible to provide in advance for each case by legislative action, therefore a certain amount of discretion must be given to the courts to vary shares if the merits of the spouses is to be a factor affecting

their shares of the economic fruits of marriage. In considering how this discretion should be delimited in the proposed legislation the Board examines the views of the Ontario Law Reform Commission. The Ontario L.R.C.'s views are set out here and in the report of the Alberta institute because they illustrate a useful approach to this difficult question.

> The [Ontario] Commission has carefully weighed the problems raised by these factors and has concluded that where strict application of the rules of the equalizing claim would lead to grossly inequitable results, there should be some power of variation residing in the court. The Commission is, however, strongly of the view that the matrimonial property regime should neither require nor allow a judge to enter into an assessment of matrimonial fault, moral entitlement or the worthiness of the parties to a termination proceeding in order to determine a spouse's eligibility for financial equalization. The Commission's recommendations in this report are aimed at creating a legal framework within which married persons can realize autonomy during the existence of the matrimonial property regime and financial equality at its termination. They are not designed to provide an economic sanction for any person's lack of industry, personal failings or lapses from contemporary moral standards.[19]

The Board professes agreement with the Ontario Commission, but only up to a certain point. The Board feels that the court should be able to reduce a spouse's share where that spouse "has failed to do what might reasonably be expected of him or her under the circumstances to such an extent that it would be unfair to allow him or her to participate in the economic gains of the couple."[20]

In so far as this formulation of the delimitation of the court's discretion differs from that of the Ontario Commission it may be thought to place more emphasis on the roles spouses may be supposed to play in

marriage. It is probable that different judges have different views as to what these roles might be. It may be that some enlightened members of the judiciary approach a married couple without any preconceptions as to who should do what.

What a spouse might reasonably be expected to contribute is further defined by Recommendation 10[21] as "money or money's worth" and "comfort, society services and assistance." While the court is enjoined to have no regard to the conduct of a spouse in so far as that conduct contributed to the breakdown of the marriage, it is submitted that in most cases conduct contributing to breakdown and the standard of conjugal reasonableness will be inextricably connected. As a result, the court will, especially where grounds of divorce such as cruelty are involved, be confusing fault and finance. Perhaps the Board is looking forward to the day when all of Canada's divorce law rests on a 'no-fault' basis.

The method of calculation of the balancing claim will be briefly described, more because that will best show how deferred sharing works, than for its immediate impact on our thesis.

Once the respective shares of each spouse is determined (i.e. what fraction of the economic gains of the marriage each is to get) the shareable gains of each spouse are calcluated. In other words each spouse's property is valued. The procedure is as follows: each spouse's assets are valued; each spouse's liabilities are valued; the deduction of liabilities from assets computes the net estate of each spouse; from the value of each spouse's net estate is deducted the value of each spouse's assets at the time of marriage. From this figure is deducted

the net value of any property received by each spouse during marriage by way of gift or inheritance from someone other than the other spouse. The final figure represents the shareable gains of each spouse. Each spouse's shareable gains are then added together and divided in accordance with the shares determined earlier by the court. In the normal case the figure will be divided into two equal parts. From the two fractions of the total of each spouse's shareable gains is subtracted each spouse's actual shareable gains. Depending upon whether the resulting figure is positive or negative, each spouse will either be entitled to receive an equalizing payment or will be required to make a balancing payment to the other spouse.[22]

Provisions of the report respecting valuation of assets and the classification of assets will not be descrbed here save for a few brief comments on one or two interesting areas.

Damages for personal injuries are a frequent source of dispute in community property regimes.[23] The Board adopts a rule to deal with them which accords with common sense and justice. Damages for personal injuries paid to a spouse

> may be excluded from the property of the spouse for the purposes of [valuation] if it is established to the satisfaction of the court that they are not compensation for economic loss suffered by the married couple during the statutory regime.[24]

This rule recognises that it may be inequitable if compensation that a spouse received for personal injuries, accrued to the other spouse, by way of the community, like a kind of windfall or prize. This is especially true when the non-injured spouse has suffered no economic loss

as a result of the partner's injuries.

If a spouse, at the date of termination, has a net negative estate because, for example, his or her property which was deductable from the rest of that spouse's property was worth more than the rest of that property, the Board recommend that the other spouse should not be obliged to make up the negative estate of the partner out of his or her own estate. In other words, a spouse whose estate shows a net gain should not be obliged to use that gain to make up for the estate of the other spouse which shows a net loss. Instead the spouse with the net negative estate should be treated as having no shareable gains.

> One spouse should not be able to claim indemnity from the other when the other has no control over the activities of the first and indeed may be entirely ignorant of those activities[25]

This rule does not apply however, when the other spouse has benefitted by the incurring of debts by the spouse with the net negative estate. Then the spouse with the estate standing at the negative amount will have a claim against the non-debtor spouse for a balancing payment of some kind. If both spouses' estates stand at a negative amount neither will have a claim for a balancing payment.

It would appear therefore that the report makes no provision for the case where each spouse has a negative shareable estate,but where one spouse's estate stands at a negative amount as the result of incurring debts while obtaining goods and services for the family. In such a case it is submitted that it would be inequitable if there was no balancing payment because each spouse had a net loss, yet that would be the result

if the report became legislation in its present form.

The report deals with various procedural issues. The only one that need be mentioned here regards the joinder of claims for balancing payments with subsisting actions of divorce etc. Joinder of claims will be the normal procedure as most regimes terminated inter-vivos of the parties will be so terminated when divorce and judicial separation actions are brought.[26]

The rights of third parties are dealt with by Recommendation 3I. The nature of the statutory regime - the spouses are separate as to property until the time of dissolution - means that the right to claim a balancing payment should rank after the claims of outside creditors during the continuance of the regime. Once judgement for a balancing claim has been given, the Board recommend that the "judgement should rank equally with judgements in favour of unsecured creditors."[27] Such a rule would not normally interfere with creditor's rights as liabilities are deducted before the balancing payment is arrived at. Where the court orders a spouse to give security for the balancing payment which that spouse must make to the other spouse, the court will have determined what the effect on other creditors will be before it so orders. It is unlikely therefore that the court will unfairly prejudice those other creditors when making the appropriate order.

Recommendation 33 is very germane to this thesis. It seeks to establish that if a couple come to Alberta after having been married and habitually resident elsewhere, the statutory regime shall apply to them as

from the date of their marriage. An exception to this rule operates when the couple "are already subject to deferred sharing". Reference here is made to the discussion on the policy behind application of the statutory regime.[28]

Under Recomendation 34 the court has a discretion to vary the shares of a couple in the shareable gains made by them before the statutory regime applies to them...

> if it is reasonable to infer that the spouses or either of them would have ordered their affairs differently if they had been subject to deferred sharing while the shareable gains were being made[29]

III. Deferred Sharing Mortis-Causa.

The majority report was earlier described as double-barrelled. The final portion of that first part of it described here deals with deferred sharing mortis-causa of a spouse. A general lack of dissatisfaction with the law of distribution on death as it now stands, makes reform of the law on this area less urgent than reform of the law on marital property inter-vivos of the spouses. The Board is less enthusiastic about a recommendation here than they might have been, however. It would be preferable if a comprehensive deferred sharing regime, applicable on dissolution of a marriage during each spouse's life and on the death of a spouse, were introduced. The concept is an easily understood one. It is probably more easily understood than the statutory provisions covering succession between spouses at the moment. We shall also show in a later part of this paper that a comprehensive scheme would avoid some conflicts of laws problems.

The majority of the Board recommend deferred sharing on death, but only in favour of a surviving spouse. The conclusion that a deferred sharing regime should only work to a spouse's benefit is a sound one. A surviving spouse is in a better position to look after any children if he or she does not have to pay monies etc. into the deceased's estate. As far as any other relatives are concerned, such as ascendants or collaterals, it is submitted that the surviving spouse should not have to pay money into the deceased's estate for their benefit.

An exception is made to the general rule that sharing should only occur if it is in favour of a surviving spouse; if there is a dependant child of the deceased spouse, such as a child from a previous marriage, that child should be able to apply for a payment from the surviving spouse for his or her maintenance. The amount of a balancing payment under this rule would not exceed the amount of a balancing payment due if sharing applied both ways on death.

The normal law of succession and the Family Relief Act[30] would apply after the provisions of the majority recommendation had been applied in any particular case. A deceased spouse's estate could still pass under the will of that spouse in so far as it was unaffected by a balancing payment.

The same general principles that apply on an inter-vivos sharing would be applied when dealing with an application on the death of a spouse. It is not clear whether a surviving spouse who applies for a balancing payment may request that the court vary the respective shares under the discretion vested in the court by virtue of Recommendation IO. If such a request may be made it may be surmised that the same sort of

evidence would be led as is led when an application is made under the Family Relief Act. However, a request under the statutory regime would be somewhat different in that the party whose conduct was being primarily attacked would be the deceased spouse. He or she would not be available to refute allegations that he or she had "failed to do what might reasonably be expected of him or her..."[31]

An alternative proposal regarding sharing on death envisages sharing being made both ways. Advocates of this proposal might argue that the claim to share in the gains of the other spouse arises as gains as made and that this claim should not be defeated - even by the death of the claimant. This view places stress on right or entitlement rather than on need or on the obligation of support. The proponents of this scheme also feel that it is important that a person has something he can will to those he chooses to succeed to his property.[32] As with the majority proposal, the existing law of succession would apply after sharing.

A final alternative proposal countenances changes of a minor nature in the existing law, such as an increase in the amount given to a surviving spouse under the Intestate Succession Act[33] and abolition of the requirement that a surviving spouse share the estate with children of the marriage where these children are adults.

The picture that emerges from the Institute's proposals regarding mortis causa distribution is of succession between spouses being put on a new footing - that of deferred sharing. The remnants of the old law

remain however to cause consumer confusion and probable administrative difficulty. They may also trammel us with conflicts problems when the law of Alberta must interact with the law of some other jurisdiction.

If the proposals for the statutory regime are enacted there will be one more factor to disincline a person from making a will to ensure that the surviving spouse will get a reasonable share of the spouses' property. One might observe that the evolution of private ownership was accompanied by an increase in the power of testation. That which family once took by virtue of their status as close relatives or dependants came to be passed, in the property owning classes at least, under the will of the deceased. The will often had conditions attached, the classic example being the entailed estate or taílzied feu. Inheritance became an almost contractual state of affairs.

Application of deferred sharing to the distribution of spouse's property may be taken as another example of legislation designed to support the family and as another example of the enlightened legislator's attempt to give family members rights by virtue of their status as close relatives and dependants. This would seem to be an ideal opportunity to indulge in the fashionable practice of reversing Maine's aphorism,[34] and to note the recommendations regarding application of deferred sharing on death as a move from contract back to status.

IV. Discretionary Distribution.

The second half of the majority proposal will now be delineated: that part which deals with couples already married and living in Alberta at the time the reforming legislation is passed.

The Board identifies two distinct questions: which law should apply to couples already married and whether the application of that law should depend upon whether a couple has agreed that it should apply to them.

Unfortunately the statutory regime is rejected as a possible, applicable system. Apart from the inherent justice of the statutory scheme it may be awkward should the statutory scheme, and its twin for couples already married, have to exist side by side for a number of years. The minority, alternative proposal of discretionary sharing is also rejected as it makes no distinction between property acquired before, and property acquired after, marriage.

The majority proposal is that a discretionary system of distribution of property should apply to couples already married and living in Alberta and that the discretionary system should only apply to gains of the couple made after the time of their marriage. The Board are attracted to the English system of discretionary distribution which has worked well in that country.

Couples would not be able to contract out of the discretionary system. Difficult situations consequent to the possible inability of spouses to agree as to which system should govern their property rights are described and offered as the main reason for such a prohibition. Also no acceptable method of contracting out can be found. While this ban on contracting out will make no difference to the majority of couples who never consider their property rights in marriage until the marriage is over, it does represent a change in the law. Subject to the restrictions that may still exist as a result of Hyman v. Hyman, couples are free to

make almost any arrangement with regard to their property that they wish. No doubt this freedom is exercised from time to time. Family, tax or other reasons may make special arrangements desirable. One wonders what the status of any agreement between the spouses as to their 'marital property rights' would be in the eyes of the court when the court came to divide property under the discretionary scheme. Could an agreement between the spouses be a factor leading the court to decide that it was "unfair in the particular case to require a sharing of economic gains with the other spouse."?[36]

The point has already been made that the policy reasons for the application rules of the statutory regime are open to criticism.[37] A related point may be made in relation to the discretionary system. One of the main reasons the Board recommends a discretionary system of distribution for persons already married and living in the province is that "it would remain open to a spouse to satisfy the court that the fairness and justice of the case do not require a full sharing or any sharing."[38] This statement is immediately preceded by another to the effect that the imposition of deferred sharing on couples already married and living in Alberta is not justified. The point is that it does remain open to a spouse living under the deferred sharing regime to convince the court that the other spouse's share should be varied or cancelled. The ambit of the court's discretion is, of course, much more circumscribed than under the discretioanry system. There is, to be sure, an impressive, not to say daunting, list of factors that the court is to take into account when assessing the share of a spouse under the discretionary

system, but it is submitted that the better course would have been to widen the discretion given to the court under the deferred sharing regime and to have applied that system to all couples - whether they were married and resident in Alberta when the legislation is passed or not. Many of the factors the court is to take into account when assessing shares under the discretionary system are, in fact, ways the court can allieviate the possible injustice of the retroactivity of the discretionary system. A general statement that the court had to take into account the justice of each case when determining shares under the deferred sharing system and application of that system to all couples might have made for more legislative clarity. It might also have conduced to greater flexibility of the statutory regime and made for a greater degree of equality between those already living in Alberta and those yet to marry and live here. A short list of factors the court could take into account would not have been out of place in such a proposal, but the proposal should apply to everyone.

Couples who are living apart under a judicial separation at the date of commencement of the Act, and couples who have been living separate and apart for three years immediately prior to the date of commencement of the Act are excluded from the ambit of the discretionary scheme. The purpose of such a rule is presumably to avoid the sharing of property between couples who have either been officially declared entitled to go their separate ways, or who have been living apart for such a length of time that they are felt to be no longer financially intertwined.

The same rules regarding computation of the shareable gains,

grounds for application, procedure on application and rules for sharing mortis-causa apply to the discretionary regime as apply to the deferred sharing regime. The discretionary system is declared to apply to (subject to the exceptions above):

> a married couple (i) who were married before the date of the commencement of the proposed statute, and
> (ii) whose common habitual residence is in Alberta or whose last common habitual residence was in Alberta[39]

Footnotes to Chapter Two

1. Institute of Law Research and Reform, Matrimonial Property, Report No. 18, 1975 at 1

2. ibid. at 3

3. ibid. at 30.

4. ibid. at 31.

5. ibid. at 31.

6. ibid. at 33.

7. ibid. at 33.

8. ibid. at 36.

9. ibid. at 35.

10. ibid. at 35.

11. ibid. at 83.

12. ibid. at 81.

13. 'Domestic' is used in the sense of involving no relevant foreign elements.

14. Institute's Report op. cit., Recommendation #3 at 37.

15. ibid. at 39.

16. ibid. at 39.

17. ibid. at 38.

18. But not if "a spouse.....at the time of a form of marriage knew that it was void or knew of a fact making it void". ibid. at 156.

19. Report of the Ontario Law Reform Commission on Family Property Law : Part 4 of a Report on Family Law (1974) at 92.

20. Institute's Report op. cit. at 46.

21. ibid. at 48.

22. See pp. 50 - 53 of the Institute's Report op. cit. for an example of how the method of calculation would work in practice.

23. See, for example, Baxter, Marital Property (1973) Chapter 13 and

Reppy and DeFuniak, Community Property in the United States, (1975) Chapter 4, part 7.

24. Institute's Report op. cit. at 61.

25. ibid. at 69.

26. See Report on Joinder of Divorce Proceedings with Other Causes of Action (1971), Institute of Law Research and Reform. This report was the prelude to an amendment to the Alberta rules of court which now allow joinder of divorce actions with other claims in certain cases. See Alberta R.C. 563 (3) and 229.

27. Institute's Report on Matrimonial Property op. cit. at 86.

28. vide ante pages 13 - 14 .

29. Institute's Report op. cit. at 91.

30. R.S.A. 1970 Chap. 134.

31. Institute's Report op. cit. at 46.

32. ibid. at 100 - 101.

33. R.S.A. 1970 Chap. 190.

34. Maine, Ancient Law 10th edn. (1912) by Pollock at 174.: "...we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."(author's emphasis).

35. [1929] A.C. 601 (H.L.)

36. Institute's Report op. cit. at 109.

37. vide ante pages 13 - 14.

38. Institute's Report op. cit at 108.

39. ibid. at 110.

CHAPTER THREE

COMMON LAW PRINCIPLES ON THE CONFLICTS OF LAW IN MATRIMONIAL PROPERTY : CHARACTERISATION.

I. Introduction.

Before discussing the conflicts of laws problems that may arise with regard to matrimonial property it is perhaps wise to delimit the field of our study with a broad, working definition of what matrimonial property is. While offering a definition, it is recognised that the law regarding matrimonial property has a necessary overlap with other areas of family law, and with other areas of the law generally, such as contract.

MARSH[1] offers the following definition of marital property:

> By that term is meant any interest (right, power privelege, or immunity) or aggregate of interests which arise in one spouse, with regard to things owned or acquired by the other spouse, solely by virtue of the existence of the marital relation, but excluding from it the "bare expectancy" of inheriting upon the death intestate of the other. In other words, any interest which a wife qua wife receives by operation of law with respect to things owned or acquired by the husband is a "marital property interest."[2]

Emphasis is placed on the concluding words of that paragraph, the reason for which will become apparent as the discussion proceeds.

A preliminary point should be made here which it will be useful to bear in mind as the discussion progresses. The concept of matrimonial property stricto sensu is unknown in the common law. While it may be arguable that there was a species of matrimonial property in existence before 1882, with the release of the wife from the constraints of the jus maritii[3] etc., marriage is admitted as having no direct legal effect on the property of the spouses. While this general statement must

be qualified in the light of legislation such as the Married Women's Property Act 1964[4] in the case of England, it is still true that "family assets" and "matrimonial property" are not terms that have, as yet, any place in either English or Alberta law.[5]

Matrimonial property is, however, a concept long familiar to civilian jurists and they have evolved rules to deal with conflicts problems in relation to it. When it is proposed, in Alberta, that a matrimonial property regime be introduced, one should be wary of transposing in unaltered form, civilian conflicts rules to deal with the problems that may arise in Alberta in connection with the new regime. The Alberta regime lacks many of the essential features of the classic community property regime. Elements of community are discernible, such as the restraint on gratuitous alienation, in the Alberta proposals, but the parties are kept separate as to property. It would be erroneous to speak of co-ownership or common ownership when referring to the regime proposed for Alberta.

II. Characterisation.

It is of the essence, of course, when dealing with property disputes between husbands and wives or between members of a family, that contain relevant foreign elements, to realise whether or not one is dealing with a question of matrimonial property. Questions of matrimonial property have different choice of law rules from questions of succession, for instance. The rule may be, for example, that the property rights of the spouses are to be governed by the law of the husband's domicile at the time of the marriage. After 20 years of married life in that jurisdiction

a couple may move so as to live under a new legal system and IO years later the husband might die. In that case are the rights of the wife to be determined by the lex domicilii at the time of her husband's death as questions of succession, or are they to be governed by the law of the matrimonial domicile as questions of matrimonial property? The point assumes some importance when the rules indicated by the choice of law rules differ as to how much of the estate the widow is to get.

This initial step in a conflicts case is usually termed characterisation.[6] The problems surrounding it have been much discussed by writers and very seldom discussed by judges on the bench. Literature on this difficult and fascinating area is extensive and learned but seldom does the reader come from it with an overpowering sense of illumination and understanding. All that can be given here is an outline of some of the issues most relevant to this study.

The ultimate solution of characterisation problems cannot be achieved so long as countries maintain their individual legal systems, each with its own distinct, internal classifications of rights and duties.[7] One of the main differences between domestic and conflicts cases is that in cases involving questions of private international law, the characterisation of an issue must be explicit. The present form of the choice of law rules ensures this. An issue must be characterised as one of 'succession' or 'contract' or 'matrimonial property' before the relevant connecting factor can be arrived at.(The connecting factor indicates the system of law that is to rule; "law of matrimonial domicile" and "lex domicilii at death"are examples of connecting factors.) In cases with

no relevant foreign elements there is usually no need for characterisation of such an explicit nature. The parties will agree that a certain set of facts falls under a certain set of rules. Their legal advisors will talk the same legal language. The classification of fact situations as a necesssary prelude to discovery of the rule is largely what legal education is about.

III. Methods of Characterisation.

When one steps outside the boundaries of a municipal legal system and its agreed-upon legal formulae and when one encounters fact situations that have relevant foreign elements one may begin to speculate, for instance, whether the law of the foreign country might not classify fact situations differently from the domestic legal system. The novel classification or characterisation of the foreign legal system might put the facts into a legal pigeon-hole which would lead to application of a choice of law rule and consequently of a rule that is more favourable to one's claim.

The process of reasoning described above is usually referred to as classification by the lex causae. It is a circular process because one cannot, logically, know the relevant foreign legal system until one has reached the stage of the choice of law rule.As was demonstrated, the lex causae approach finds the choice of law rule after characterisation of the issue according to the system one is led to after applying the choice of law rule. However, classification according to the lex causae is preferable to classification according to the law of the forum - the lex fori.

The lex fori approach seeks to characterise a fact situation containing relevant foreign elements by the domestic law of the forum before which the case is heard. Thus, if it is argued before an Alberta judge by opposing counsel that either French or German law should apply, according to whether one viewed the question involved as one of matrimonial property or as one of succession, the judge would, on the lex fori approach, classify the question in accordance with Alberta law. He would determine, according to Alberta law, whether the case involved matrimonial property or succession and, according to that classification, would reach a choice of law rule and a rule of foreign law. But, it has been said that this is like trying to conjugate a French verb according to the rules of English grammar. Under the lex fori approach the judge using it has no way of knowing whether the the foreign law pointed to would apply itself in the given case. The judge may define succession using the Alberta notion and apply the law of the domicile at death of a deceased in a situation where the lex domicilii on succession is totally inappropriate. Apart from the serious risk of distortion of the foreign rule under this approach, classification by the lex fori will fail totally if there is no close analogy between an an institution of the law of the forum and an institution of the law pointed to by the choice of law rule. Even apart from the case where there is no analogous institution in the lex causae, the lex fori approach may fail if like institutions are called different names.

There are too few conflicts cases before the courts to allow a fast and a smooth development of principle in every area. This seems even more true of Canada than of England. Characterisation suffers from

the same handicap as other areas of conflicts but, for characterisation, this problem is exacerbated by the common failure of parties to recognise characterisation issues in a dispute before them that has relevant foreign elements.[8] There is no explicit commitment in the present adversary system of litigation to the evolution of principle, apart from the doctrine of stare decisis. It is often said that a court will not decide on a question of foreign law that is not raised in the pleadings of the parties. Similarly, it is true that in a conflicts case there is no onus on the court to ensure that a dispute is assigned to a legal category that will allow the case to become a worthwhile precedent after the commentators have analyzed the case and extrapolated from it. The burden of recognising classification problems must rest on counsel. Once they do appreciate that a classification issue lies at the root of a dispute with relevant foreign elements, they may draw the logical circles of the lex causae approach to characterisation, in the pleadings. From these competing logical circles the court may choose that [il]logical classification which would seem to do most justice in the instant case.[9]

IV. Functional Characterisation.

But there is a better way. If the courts would be prepared to take the time and effort to vigorously shun the easy way out of classification problems (which often creates more problems than it solves) and adopt a species of that approach sometimes known as the theory of classification by analytical and comparative law, conflicts jurisprudence would be very much the richer.[10] Reference is made again to MARSH:

> The major policy by which a characterisation should be tested, in the opinion of the writer, is the objective of grouping together, for choice of law purposes, those rules of law in different jurisdic-

II
tions which serve the same legislative purpose.

Emphasis is placed on the concluding words of that excerpt and the approach advocated by Marsh is described here as functional characterisation.

Under this approach the court should look at the function of supposedly different rules of law in the various legal systems indicated by the various classifications open to the court. If the rules indicated display the same function then a conflict may be avoided. This approach does not rely on the names of institutions given by municipal legal systems. If conflicting classifications leading to a conflict of choice of law rules arises the court should look closely at the legal institutions indicated by the various connecting factors. If these legal institutions have the same legislative functions the court may safely choose one of them without the fear of doing violence to the other. A close study of legislative functions will similarly solve those spurious conflicts caused by a naivety of comparative jurisprudence or by an intentional disregard for the purpose of an institution in the hope that the court will be taken in by that classification.

For example, if a widow claims half of the property of the couple under the law of France, which was the matrimonial domicile, and half of
I2
the deceased's estate as a non-barrable share under the law of, say, Kansas, the domicile at death, the court should realise that the function of both rules of law is the same. Both exist to provide financial support for a surviving spouse in recognition of that spouse's contribution to
I3
the marriage. In the case posed the court should refuse both claims and award no more than a half of the property of the couple to the widow. To do otherwise would be, in essence, to give effect to neither law. Neither

the law of the matrimonial domicile which is taken to regulate the matrimonial property rights of the couple, nor the law of the domicile at death which is taken to regulate succession, would give the widow three-quarters of the spouses' property in recognition of a wife's contribution to the marriage. To allow both claims would comply with both laws in a mechanical sense. In a real sense however, such a course would violate both laws.

I4

MARSH contrasts the case of a claim for a non-barrable share along with a claim for half of the goods in communion, with a claim for a share of a deceased's estate under a rule dealing with succession on intestacy along with a claim for half of the goods in communion. He feels able to draw a distinction between a rule which allows a widow to succeed to half of her husband's estate on his death intestate, from a rule which provides for a non-barrable share. One is "to provide for distribution to those who, it is conceived, would be the natural objects of the decedent's bounty in cases where he had failed to indicate a choice, regardless of their contribution to the estate". The other is to "recognise the probable contribution of each spouse to the acquisitions of the other".

I5

On this reasoning MARSH would have to approve of the decision in Beaudoin v. Trudel [1937] OR I. In that case the husband was allowed to claim half of the community property of the spouses under the matrimonial property law of Quebec, the domicile of both spouses at and after the marriage, plus half of the deceased wife's estate under the Ontario Devolution of Estates Act. Ontario was the domicile of both parties at

I6

at the time of the wife's death. The Ontario Act provided for succession on intestacy, and the deceased could have, at any time, defeated her husband's claim by making a valid will. Emphasis on this point in the Ontario Court of Appeal[17] suggests the the court took the same distinction as to the purpose of the rules of law governing the two claims as MARSH puts forward.[18]

The validity of MARSH's approach on this point may be questioned if one is advocating a broad functional approach to characterisation. It is submitted that the approach to classification which concentrates on legislative purpose is a sound one. MARSH recognises its value as is shown by the discussion of relevant U.S. cases below. But it is submitted that he did not carry his thesis far enough. To accept that a right of intestate succession should always be characterised, for choice of law purposes, as an issue of "succession" is to leave the way open for false conflicts when a case like Beaudoin v. Trudel arises. It should be recognised that, on the death of a spouse domiciled in a common law jurisdiction where there are intestate succession rights accorded a surviving spouse, the surviving spouse should not be allowed to claim half of the spouses' goods under the matrimonial property law of some previous matrimonial domicile in addition to his or her share under the intestate succession legislation. The purpose of a "community property regime" on death is not only to provide for recognition of a spouse's probable contribution to the gains of the other spouse. The typical community property regime is a scheme of property distribution, support, and for the equalization of economic inequality between the spouses.[19]

It may be argued that the true merit of a functional approach lies in its ability to comprehend the entire scheme of any given system of law's rules regarding property distribution between the spouses. As long as any rule is allowed to remain sacrosanct behind a label such as "intestate succession" and always referred to the lex domicilii on death while other rules, however varied their nature, are looked at for their true function, a'functional characterisation' so called will leave space for false conflicts.

It is submitted that a true functional approach to characterisation may legitimately look beyond the narrow purpose of individual rules of law of any given system. Legal institutions are evolved to deal with fact situations. What should be appreciated also is that most legal institutions are evolved to deal with fact situations without relevant foreign elements. The typical characterisation problem involves a rule evolved for the "home grown" case being applied to a set of facts in competition with another equally domestic rule of another legal system intended for consumption only on its home market. If the set of facts had occurred in the jurisdiction of the country producing the first rule, the domestic rule would have been applied without cavil. The characterisation of the set of facts would have been understood as implicit. The same can be said if one postulates that the set of facts involved had occurred wholly in the country producing the competing rule.[20]

Taking the Beaudoin v. Trudel type case again and applying the reasoning outlined above it can be seen that, had the facts occurred wholly in Ontario, the relevant rule or legal institution understood as

applicable would have been the Ontario Devolution of Estates Act. Had the facts occurred only in Quebec, the matrimonial property regime of Quebec would have provided for the distribution of the wife's estate, and her rights of 'intestate succession', as understood by common lawyers, would have been minimal. It is the disposition of a set of facts by a legal system that must be looked at. It may be emphasised that it is legal systems that are in competition, not abstract rules of law, when opposing characterisations are put forward in a conflicts case. If rules of law are taken out of their systems and applied cumulatively, as was done in Beaudoin v. Trudel, neither rule of law has, in fact, been applied. A rule of law, such as that contained in the Ontario Devolution of Estates Act, only really means anything when taken in the context of the rest, if any, of Ontario's provisions dealing with the distribution of spouses' property on dissolution of marriage by death. The same is true of the Quebec matrimonial property regime. Just as a municipal legal system has subdivisions or legal institutions to deal with fact situations, so one must look at how each system would deal with a fact situation when opposing characterisations are put forward.

The present form of choice of law rules is a trap that can lead to narrow characterisations and to the application of rules of law divorced from the sytems from which they come and which give them meaning. As long as fact situations are characterised as 'succession' or 'marital property' cases, then individual rules will continue to be applied without regard to their place in the system they came from. Reverting once again to Beaudoin v. Trudel, a classification of the issue raised there

as involving 'marital property' should have lead to application of the law of the matrimonial domicile (or whatever system of law was indicated by the choice of law rule the court was using). What should have been realised however is that the relevant rule of the law of the matrimonial domicile, i.e. the matrimonial property regime, was the system that would have dealt exclusively with the facts involved had they arisen only in Quebec. Similarly, classification of the issues as involving 'succession' should have lead to the application of that system of property distribution favoured by the law of the domicile at death (or by whatever system of law was indicated by the choice of law rule the court was using). If that had been the course followed it should have been recognised that that system was one that should have been applied exclusively. For, had the facts occurred wholly in Ontario that would have been the course followed. The court should have recognised that there was no room for, and no point in applying, two systems, each with the same end - eqitable distribution of spouses' property on the death of a spouse - and each intended to be all-embracing in its application.

Taking briefly another example which is, in a sense, the converse of that set of facts raised in Beaudoin v. Trudel, we can again see how a court should proceed using functional characterisation. A couple domiciled in Alberta marry in Alberta in 1920 and live here until 1960. In 1960 they move to Quebec, the husband dying domiciled there in 1970. Assuming that Quebec would not apply its matrimonial property regime to couples who did not have their original matrimonial domicile in that province, and that the Civil Code does not give a surviving spouse sub-

stantial succession rights (as understood in the common law sense) on the death of her husband intestate, how could a court in Alberta regulate the property distribution of the couple so as to give the widow a fair share of her husband's property? Let us assume that the relevant choice of law rules employed by the Alberta court are as follows: "The law of the domicile at death regulates succession"; "The law of the matrimonial domicile of the parties regulates distribution of marital property, and the law of the parties matrimonial domicile is presumed to be the law of the husband's ante-nuptual domicile".

Firstly, both systems would give the widow a substantial share of the property owned by the spouses had all of the facts outlined above occurred either in Quebec or in Alberta. However if the Alberta court referred "succession" rights to the law of Quebec, the widow would get very little if that term was interpreted in its traditional sense. Similarly, if the Alberta court referred "matrimonial property" rights, as they are traditionaly understood, to the law of Alberta, the widow would receive very little under the system of separation of property in force here.

Therefore the second step by the court should be to classify the issue as one of succession and refer to the domicile at death. The Alberta court should then apply that institution of the law of Quebec designed to regulate the distribution of spouses' property on dissolution of marriage by death, i.e. the Quebec matrimonial property regime. Application of that law should be without regard to Quebec's renvoi rules, for the rule that Quebec will not apply its matrimonial property regime to those who do not have their first matrimonial domicile there is, in effect,

a rule that will introduce a renvoi back to Alberta law as Alberta law is the first matrimonial domicile of the couple. Quebec's renvoi rule, or rather the conflicts rule of Quebec that will produce the renvoi, would only come into play if the Alberta court allowed itself to be trapped by the form of choice of law rules. The fact that Quebec law would classify the issues raised as involving matrimonial property (which is the basis for the rule that Quebec law will not apply itself in this situation) becomes irrelevant if one considers that the legislative intention of the Quebec matrimonial property regime on a spouse's death is much the same as the succession statutes of Alberta.[21] Because the legislative intention of the two institutions approximates, the form of choice of law rules should not lead the court to follow a spurious classification and renvoi which is based on a distinction without a difference, to the illogical, not to say unjust, conclusion of giving the widow nothing.[22]

V. Examples of Functional Characterisation.

The approach to characterisation outlined here is a broad one. It also requires the court to take a more active role in handling conflicts problems' characterisation that it might be traditionaly inclined to take. While it is an approach which demands more effort from the judiciary and from counsel it is an approach that avoids false conflicts and abuse of the conflicts system.

Some courts in the United States have used this method of characterisation and it has attracted some commentators. Reference is again made to the writings of MARSH[23] and to his discussion of La Selle v. Woolery,[24]

a decision of the Supreme Court of Washington.

MARSH[25] describes characterisation which does not take account of the functions of institutions as "epithetical jurisprudence". He shows that one must be especially careful in matrimonial property conflicts to ensure that concepts which have the same name are, in fact, the same. His discussion of La Selle v. Woolery[26] makes the pitfalls of mis-characterisation obvious. In that case a question involving the liability of community property was in issue. In essence the court held that debts incurred by the husband in Wisconsin, a common law state as far as spouses' property rights are concerned, were not chargeable on the community property of the spouses who were domiciled in the community property state of Washington at all times. MARSH summarizes the ratio of the case:

> The court found assertions in the Wisconsin decisions that debts incurred by the husband in that state were his "separate" debts, meaning thereby that the "separate" property of the wife was not liable for them. Of course, every debt contracted by the husband in Wisconsin would be a "separate" debt in this sense. The Washington court then reasoned as follows: This debt of the husband is a "separate" debt by the law of Wisconsin [meaning, "not chargeable upon the wife's 'separate'property"] The law of the place of making of the contract [Wisconsin] governs the "character" of the debt. Therefore, this is a "separate" debt of the husband [meaning,"not chargeable upon the community property of husband and wife"]. The verbal fallacy in this argument is about as obvious as that in the old syllogism: All batteries are torts. An automobile has a battery. Therefore an automobile is a tort.[27]

In La Selle v. Woolery the court were, of course, confusing common law separate property and community separate property. The two are very different. In the common law "separate property" generally means all the property of each spouse, there being no conception of matrimonial property or family assets. In community property jurisdictions it generally means

that defined part of each spouse's property not in community. It is a species of property akin to that which, under the regime proposed for Alberta, would form allowable deductions from shareable gains.

It would be wrong, however to suggest that the epithetical approach to characterisation is dominant in the American jurisprudence on the conflicts of laws. The gloomy picture presented by MARSH needs to be updated and brightened by decisions which show that the courts are not blind to the pitfalls of mis-characterisation and which indicate that awareness of the real issues involved may be growing. One can contrast the approach in La Selle v. Woolery and in another case of the same complexion, Latterner v. Latterner,[28] with the more enlightened pronouncements in the very recent case of Berle v. Berle.[29]

In Berle v. Berle the wife claimed that property acquired while the parties were domiciled in New Jersey, a common law state, should be divided between the parties on the dissolution of their marriage even though Idaho, the state of the forum and a community property state, did not permit division of the "separate property" of a husband and wife.

> Appellant maintains that the concept of "separate" property in New Jersey differs significantly from the concept of "separate" property in Idaho. Therefore, appellant argues that it would be wrong to apply an Idaho statute designed to cover the distribution of "separate" property, as that term is understood in this community property state, to the contested property, which being "separate" property under New Jersey law, carries with it the qualifications and incedents of ownership that that common-law jurisdiction attaches to it. We find this argument to be persuasive.[30]

In summary therefore, of this discussion of characterisation, it is submitted that in characterising concepts in the area of matrimonial

property law the court should be careful to see that the true legislative purpose of a rule or of an institution is identified. To mechanically take concepts like'matrimonial property' or 'succession' and apply the recognised connecting factor such as 'the law of the matrimonial domicile' or 'the law of the domicile at death' without regard to the purpose or function of the institution involved is at best unhelpful and at worst a farce.

Perhaps no one theory of characterisation is adequate to solve hard cases and avoid bad law;

> [But]...it is not argued that all doctrine be rejected in Conflict of laws. The suggestion is that the development of doctrine be based on perceptions of policy relevant to the problem in hand, unrestricted by confusion of terminology and inappropriate distinctions.[3]

Footnotes to Chapter Three

I. Marsh, Marital Property in Conflict of Laws (I952).

2. ibid. at II.

3. Married Women's Property Act I882 (U.K.) Chap. 75.

4. Chap. I9 (U.K.).

5. Pettitt v. Pettitt [I970] A.C. 777 (H.L.) from the speech of Lord Upjohn at 8I7 : "My Lords. in my opinion the expression "family assets is devoid of legal meaning and its use can define no legal rights or obligations."

6. The term was coined by Falconbridge: See Falconbridge, Characterisation in the Conflict of Laws, (I937) 53 L.Q.R. 235 at 239.

7. Compare Rabel, The Conflict of laws : A Comparative Study, 2nd edn. (I958) at 6I and Lorenzen, The Theory of Qualification,(I920) 20 Col. L. Rev. 247 at 282.

8. See In the Estate of Maldonado [I954] P. 223. Although cited extensively as an example in English law of classification by the lex causae, the implicit assumption was made in that case that a question of succession was involved. If the case had been purely English, however, the state would have taken the goods of Maldonado as bona vacantia; there would have been no question of succession, as understood in English law, involved. (I am indebted to Professor A.B. Wilkinson, Dean of the Faculty of Law at the University of Dundee for this observation).

9. Rabel, op. cit. at 65 : "In any case an imperfect attempt to do justice to foreign institutions is superior to any technique which ignores them. Judges are fully entitled to limit their inquiries to the two or three laws primarily influencing a case...."

I0. op. cit.

II. ibid. at I29 - I30.

I2. i.e. a share of the deceased's estate which must pass to the surviving spouse and which cannot be defeated by the terms of any will of the deceased.

I3. Marsh op. cit. at 245 - 246 : "It is apparent that the wife should not be given more than one-half of the property since the'community interest' and the 'non-barrable interest' of the two states were designed to serve exactly the same purpose and neither law gives her more than one-half."

I4. Assume that most of the spouses' assets stand in name of the husband.

In such a case the widow would get half of the spouses' property under the community property law and half of the husband's half under the succession law. That equals three-quarters of all the property of the spouses.

15. Marsh op. cit. at 13.

16. R.S.O. 1927 Ch. 148.

17. [1937] O.R. I at 5 per Latchford C.J..

18. vide supra n. 13.

19. Amos and Walton, Introduction to French Law, 3rd edn. (1967) at 253 : "Obviously where death ends the marriage, there will be a close link oetween the matrimonial regime and the law of succession. Indeed, the feeble rights (to English eyes) of the surviving spouse in the French law of intestacy are only understandable by reference to the considerable rights that the spouse normally enjoys by virtue of the matrimonial regime."

20. This is obviously more true where one has a real, latent conflict of characterisations and not a mere spurious one dreamed up by counsel for the occasion. vide supra n. 8.

21. See Kahn-Freund, Comparative Law as an Academic Subject (1965) at 22

22. Neuner, Marital Property and the Conflict of Laws, (1943) 5 Louisiana Law Review 167 at 176 :"A functional approach would suggest that so much of the "separate property" of the spouses as is the fruit of common labour of the spouses before their immigration should be treated as community property."

23. op. cit.

24. 11 Wash. 337, 39 P. 669 (1895), rev'd on rehearing 14 Wash. 70 44 P. 115 (1896).

25. op. cit.

26. op. cit.

27. Marsh op. cit. at 150.

28. 121 Calif. App. 298, 8 P. 2d 870 (1932).

29. 97 Idaho 452, 546 P. 2d 407 (1976).

30. 546 P. 407 at 409 per McQuade C.J..

31. Cheatham, Internal Law Distinctions in the Conflicts of Laws, (1936) 21 Corn. L.Q. 570 at 589 - 590.

CHAPTER FOUR

COMMON LAW PRINCIPLES ON THE CONFLICTS OF LAW IN MATRIMONIAL PROPERTY : CHOICE OF LAW

It is the intention of this chapter to set out the main features of the conflicts rules regarding choice of law in matrimonial property questions.

I. Marriage Contracts.

Two situations are commonly differentiated by commentators. The first, and in many ways the simplest case, is that which involves a marriage contract. While the number of couples who enter into express, written marriage contracts is now small, the effect of a relevant foreign law may be to ascribe to couples the acceptance, as a tacit contract, of a matrimonial property regime. In some of the civil law countries it is normal for a couple to choose at the time of marriage, a regime whose terms and conditions are set by law. Such a choice may be express and written, or it may be implied from the fact of marriage. Its effect is to set the property relations of the couple on a contractual basis thereafter.

It is generally agreed that a marriage contract will regulate the property relations of a couple from the time of marriage and that a change of domicile by the couple at a later date will not be relevant.[1] If the marriage contract is express it may choose the proper law that is to govern it. In the absence of an express choice of proper law the proper law falls to be ascertained in much the same way as in other contracts,[2] but "the weight to be given to the various factors to be taken into

consideration is specifically different"[3]. The matrimonial domicile is considered primarily important.[4]

Where there is no express contract there is, of course, no express choice of law as the proper law. In such a case the proper law of the implied contract is taken to be the law of the matrimonial domicile.

II. Matrimonial Domicile.

It will be appreciated therefore that the concept of matrimonial domicile is germinal in determining the proper law of a marriage contract where there is no express choice. The proper law is important because it will, in general, govern the validity, interpretation and effect of a marriage contract. Although the matrimonial domicile is a central concept however, its precise meaning in Canadian and in English law is debatable. Until 1956, DICEY[5] and CHESHIRE[6] carried on an academic debate through the medium of their respective texts as to what the phrase meant. The debate was largely academic because there were no authorities directly in point. DICEY put forward the more traditional view that matrimonial domicile means the husband's domicile at the time of the marriage. CHESHIRE argued that matrimonial domicile should mean the country of the intended matrimonial home.[7]

The 'intended matrimonial home' theory was demonstrated to be sociologically superior to the traditional view and to be practically more useful when the parties come from different ante-nuptual domiciles. The theory has its defects however, such as uncertainty as to what the parties' domicile is between the time of the marriage and the time of the taking up of residence in a new home with the intention to stay there. These defects were at least partially responsible for the theory's rejection in

Re Egerton's Will Trusts.[8] There, Roxburgh J. held that the husband's ante-nuptual domicile is presumed to be the matrimonial domicile and that this presumption can be rebutted by express contract or by "what is loosely called a tacit contract, if the circumstances warrant the inference of such a tacit contract".[9] The ratio of this case is perhaps one step closer to judicial acceptance of the intended matrimonial home theory than the case of In re Martin.[10] There, only an express contract was held sufficient to rebut the presumption that the husband's ante-nuptual domicile is the matrimonial domicile.

The view in Re Egerton's Will Trusts seems to have been well established in Canada before 1956.[11] In In Re Jutras Estate, Haultain C. J.S. in the Saskatchewan Court of Appeal considers what the proper law of a marriage contract, made in Quebec between a man domiciled in Saskatchewan and a woman domiciled in Quebec, is:

> Generally speaking, the law of the matrimonial domicile, that is, the husband's domicile at the time of marriage (in this case, Saskatchewan), in the absence of an expressed or impied intention to the contrary, will apply.[12]

The intended matrimonial domicile theory may be traced back to the writings of the American jurist, Joseph Story.[13] However, even in most of the jurisdictions in his native country, the theory has been paid only lip-service, and repeated criticism of the theory has left it without much doctrinal support.[14]

The various theoretical considerations may be outweighed by an overriding consideration of practicality and the ease with which one can refer to the ante-nuptual domicile of the husband. It is recognised that

the traditional rule may be criticised on the ground that it does not accord with present day notions of equality of the sexes in marriage. However, while the doctrine may be archaic and sexist, it is submitted that the intended matrimonial domicile theory should only be given play in the special circumstances outlined in Re Egerton's Will Trusts. While the facts of that case did not justify application of the novel view, a case where they did justify application of the intended matrimonial home theory was Frankel's Estate v. The Master.[15] There, the husband's domicile of origin was German and he married a woman who was domiciled in Czechoslovakia. They married in Czechoslovakia but at the time of the marriage the parties firmly agreed to leave that country and to emigrate to South Africa. They did this four months after the marriage with the intention of remaining permanently in South Africa. The husband died in S.A. after II years and, in a question as to whether S.A. community of goods governed the property relations of the parties or whether they were to be regulated by the law of Germany, the Supreme Court of S.A. held that German law applied.[16] The result of this case is criticised by CHESHIRE. The decision does seem to conflict with common sense and justice (for not being subject to community of property, the widow was liable for death duties on the whole of her husband's estate). The intended matrimonial home theory could obviate injustice caused by strict application of the traditional doctrine in such cases.[17]

III. Cases Without Marriage Contracts : Static Situation.

Just as the ante-nuptual domicile of the husband may be taken as having the dominant role in determining what the proper law of a marriage contract is, so again it may be taken as determining the marital property

rights of spouses to each other's moveable property where there is no marriage contract.[18] Again the husband's ante-nuptual domicile is taken to be the matrimonial domicile.

It will be appreciated that a distinction is taken here between moveable and immoveable property. The influence of feudal law and of the medieval post-glossators, who were primarily concerned with jurisdiction rather than with choice of law, have left the lex situs of land with a strong influence over cases that deal with immoveables. Where marriage contracts are being considered a distinction between the matrimonial domicile and the lex situs of land owned by either spouse does not seem as important as in the case of no marriage contract. There is only one British decision directly in point - Welch v. Tennant,[19] an appeal from the Scottish Court of Session to the House of Lords. There, the lex situs was held to govern the rights of a husband and wife in land where there was no marriage contract. There does not seem to be a relevant Canadian case regarding the law which governs in the absence of an express marriage contract or in the absence of an implied marriage contract. In Taillifer v. Taillifer[20] Ferguson J. dealt with contracts and said a marriage contract would "govern and control....property wherever situated, provided that in the case of real property the requirements of the laws of the country in which the real property is situated are complied with, the contract, of course, not being repugnant to the laws of the country where the lands are".[21]

CASTEL[22] does not limit the rule that the matrimonial domicile of the spouses will govern their property where there is no marriage contract, to the case where only moveables are involved.[23] The cases he seems to rely

on for this proposition are De Nicols v. Curlier[24] and Re De Nicols.[25] As will be seen, these cases proceed on the ground that the couple having married while domiciled in France without an express choice of matrimonial property regime were deemed, by the law of France, to have accepted the regime legal[26] as a tacit contract. This regime provided for community of goods between the couple as if the couple had made an express contract incorporating the relevant articles of the Code Napoleon. Community of goods was held to continue to govern moveables and land acquired after a change of domicile to England because of the tacit contract. The cases do not therefore establish a rule for cases where there is no marriage contract. While it may be more convenient to refer questions relating to spouses' rights to land to one law - the law of the matrimonial domicile - as ANTON[27] points out, the lex situs[28] must decide what rights may be created in its own land. Perhaps the objectives of private international law may be circumscribed by notions of state sovereignty after all.

IV. Cases Without Marriage Contracts : Dynamic Situation.

While the husband's ante-nuptual domicile, or more accurately, the matrimonial domicile, governs the rights of each of the spouses to the other's moveables in the absence of a marriage contract as at the date of the marriage, the question naturally arises as to which law governs spouses' marital property rights if there is a subsequent change of domicile. Is it the law of the matrimonial domicile, the law of the new domicile or a combination of these systems?

One could opt for total mutability, which would mean that the instant domicile of the parties would govern the spouses' rights to each

other's property wherever acquired. Spouses' marital property rights would change with each change of domicile and be governed by the law of the new domicile. Such a rule would, it can be surmised, smack of injustice, and would be open to abuse. A total mutability rule could only be fair if all countries' matrimonial property laws were uniform, in order that marital property rights once held under lex domicilii, A could be lost and replaced by similar rights after a change of domicile to country B. However, countries' laws do differ and, even where similar, institutions are often given different names; a fact which can lead courts to employ a myopic characterisation which defeats the objects of both countries' rules.

At the opposite end of the spectrum from total mutability one would expect to, and indeed does, find total immutability. Immutability fixes spouses' marital property rights according to the law of the spouses' matrimonial domicile. Subsequent changes of domicile are irrelevant under this theory.

The doctrine of immutability is applied in many countries with a civil law tradition where matrimonial property regimes are normal. It is a rule which ensures a just division of property between spouses is not affected by a change of domicile. However, just as the rule can perpetuate a just regime, it can perpetuate an unjust one. It is considered singularly innapropriate to apply a foreign law to a couple who emigrated from their matrimonial home soon after marriage, with little property and no intention to return permanently to their country of origin. The root of such an attitude may be called legal practicality or legal chauvinism, but it is probably true that the immutability doctrine was

rejected in the U.S. due to a lack of familiarity with, or even suspicion of, foreign marital property sytems. For a country such as Canada, which has a large immigrant population, the problem of matrimonial property regimes imposed by domiciles of origin should be a fairly common one.[29]

Other considerations militating against application of the law of the matrimonial domicile under a doctrine of immutability are likely injustice to creditors of spouses in the new domicile, and the necessity for inconvenient, expensive and inconclusive reference to a foreign law under it. Creditors of spouses in a new domicile may give either spouse goods or services on credit without any notion that the spouse may be incapable of owning any of the assets of the spouses under the law of the spouses' matrimonial domicile. With regard to foreign law references, one must bear in mind that many marital property questions will not arise until long after the change of domicile from the country of origin and, in the meantime, the law of the matrimonial domicile may have changed.

V. Limited Mutability.

The position that the Canadian and English courts are generally accepted as having taken is that of limited mutability.[30] Under this theory, which may be regarded as mid-way on the spectrum mentioned above, the rights of the spouses to each others' moveables are governed by the law of the new domicile, "except in so far as vested rights have been acquired under the law of the former domicile". CHESHIRE takes a distinction between 'inchoate' and 'vested' rights.[31]

This approach had its difficulties also, not the least of them being with regard to accounting and the identification of property as being acquired in this domicile or in that domicile. Its merit is that

it pays sufficient attention to each of the legal systems under which spouses may have lived, and that it apportions their rights according to how long parties have lived under each system.

The limited mutability approach has judicial support in some Canadian jurisdictions. The authorities are canvassed briefly (for there are not many) by Verchere J. in Re Heung Won Lee:[32]

> The question turns on whether the law of the matrimonial domicile continues to apply to after-acquired property. The law on this point seems unsettled. The editor of Dicey, 6th ed., states as Rule I29 that:
> ..the rights of husband and wife to each other's movables, both inter vivos and in respect of succession, are governed by the law of the new domicile, except in so far as vested rights have been acquired under the law of the former domicile.
> But then added that this rule as it rests on the "old and unsatisfactory"authority of Lashley v. Hog (I804), 4 Paton 58I cannot be said to be settled law.
> In Nova Scotia however it was stated by Meagher J., in Pink v. Perlin & Co. (I898), 40 N.S.R. 260 at p. 262 that:
> The law appears to be that mutual rights of husband and wife as to personal property are governed by the law of the matrimonial domicile, and such rights are not affected by a subsequent change, but rights acquired after such a change are, of course, governed by the law of the actual domicile.[33]

The judge went on to apply a rule of limited mutability.

One must contrast the position of British Columbia and Nova Scotia (and possibly the other common law provinces) with that of Quebec. Before doing so,however,reference should be made to the writings of CASTEL.[34] In his casebook on Canadian conflicts of laws he puts forward a limited mutability rule as applicable in'some jursidictions'. As the general rule

he indicates that:

> In the absence of an express marriage contract or settlement, there is a presumption that the matrimonial property of the spouses is determined by the lex domicilii of the husband at the time of the marriage. Changes of domicile do not necessarily affect the rights of the spouses. If the law of the matrimonial domicile confers vested rights, a subsequent change of domicile is irrelevant.[35]

His limited mutability rule is based on the suggested rationale that there cannot be vested rights in future acquisitions. It may be that some jurisdictions hold that there cannot be vested rights in future acquisitions and it is submitted here that the reason for this is that the common law jurisdictions do not accept the notion of the tacit contract.

If this is the case, then the statement that there is a presumption that the matrimonial property rights of the spouses are determined by the matrimonial domicile must be open to qualification. One cannot say that changes of domicile do not necessarily affect the rights of the spouses for, in the case of the common law jurisdictions at least, the spouses have no marital property rights. It is submitted that CASTEL's statement of the law leaves the question of which law applies, open. This may be a result of the lack of decided cases on the subject. What CASTEL's rule may be based on, in part, is the difference of approach between the common law jurisdictions and Quebec.

It can certainly be shown that Quebec professes a different conflicts rule from that at least shown in the cases described above. The Quebec conflicts rule is much closer to one of immutability than that put forward by CASTEL in his casebook. The Quebec choice of law rule on the effect of a change of domicile on spouses' rights in each other's property

seems well settled:[36]

> Il est bien etabli, dans la doctrine comme dans la jurisprudence, que lorsque les epoux changent de domicile pendant leur marriage, le loi du domicile matrimonial continue de s'appliquer a leur biens mobiliers et immobiliers. On respectera les droits acquis.[37]

The final sentence of that excerpt reveals the basis of the Quebec approach lies in the notion of the tacit contract. Rights are acquired under that contract and given effect to no matter where the spouses may move to. The rule outlined above would also suggest that Quebec would apply immutability to couples moving to that province from a common law province. That point is open however.

While the conclusion is probably safe that the conflicts rule on mutability in Quebec differs from that of British Columbia and Nova Scotia, one can only agree with the conclusion of another that, as regards the rule in the common law jurisdictions, "there can be no assurance that a like decision will be reached when the necessity arises."[38] One could postulate that a case may well turn on how a court views the facts in question and on the justice of the individual claim.

It would be useful perhaps to comment briefly on the cases that are usually taken as the starting points for a discussion of mutability of the law applicable to matrimonial regimes.

Lashley v. Hog[39] was an appeal to the House of Lords from the Scottish Court of Session. It is often taken as authority for the mutability theory and, just as often, quickly distinguished as involving a successorial, rather than a matrimonial property, claim. In Lashley v. Hog Mrs Lashley claimed her mother's share of the 'goods in communion'

which her mother's representatives became entitled to on the dissolution of her mother's marriage by her mother's predecease of her father. Mr. and Mrs. Hog, the parents of the claimant, had married in England while Mr. Hog was domiciled there. There was no marriage contract. After 15 years of married life together in England, the couple moved to Scotland and acquired domicile there. Mr. Hog survived his wife and the daughter's claim was raised after his death.

The House of Lords held that Mrs. Lashley's claim was well founded, and for many years this case was taken as a rejection of a theory of immutability. The House proceeded on the ground that the wife's marital property rights were not fixed by the law of the matrimonial domicile (England) but that Mrs. Lashley could claim the rights given to her mother by the Scots law of communion of goods. Mrs. Lashley did argue that the right given to her mother was a rights of succession and, certainly in a later case[40] the House of Lords characterised the claim thus. However;

> It is important to note that the wife's representatives took this share if she predeceased her husband. Their right was not one of succession to the husband, but a rights arising on the dissolution of the marriage and of the "community of goods" by the wife's prior death.[41]

Certainly, it would be a strange sort of succession in which the dead succeeded to the goods of the living. The Scottish system did have elements of community in it at that time, and it is certainly going too far to suggest,[42] as Lord Halsbury did in De Nicols v. Curlier,[43] that the Scottish communio bonorum was a mere fiction. It is perhaps worth noting as an aside, that at the time of Lashley v. Hog, Scottish appeals to the House of Lords were decided by committees of English judges who were

usually ignorant of the law of Scotland. Some confessed their ignorance, "others merely showed it in their judgements."[44] In any case, it is probably true that Lashley v. Hog is no longer regarded as a useful precedent om matrimonial property, in so far as it is constantly distinguished.

The De Nicols cases[45] are usually taken as establishing the conflicts of law rule as regards the inviolability of vested rights in the common law world. The facts of that dispute can be set out in brief compass. The parties married in France while domiciled in France without an express marriage contract. They therefore became subject to the French system of community of goods as if they had made a contract to that effect. They changed their domicile to England and acquired moveable and immoveable property there. The first De Nicols case held that the wife was entitled to one-half of the moveable property of the spouses under the tacit marriage contract as if the spouses had remained domiciled in France. The second De Nicols case dealt with land owned by the parties in England,[46] and has been mentioned.

The vested rights theory has its defects, not the least of them being how one decides whether a right is vested or not. At one end of the marital property spectrum one can identify the rights of each spouse in the community property in a "full community" or in a civil law "community des acqets" as in rem. At the other end of the marital property spectrum one can identify the rights of each spouse in their own property in a common law country as in rem. On the other hand, the spouses will not have what can reasonably be called a right in personam or a right in rem in the property of the other spouse in the common law

jurisdiction, arising out of the fact of marriage, until the time of dissolution of the marriage by death or until some judicial pronouncement is made to that effect. Somewhere in the middle one may find participation in acqests or "deferred community" the system proposed for Alberta. In such a system a spouse may have rights in rem in his or her own property (although these rights will be less absolute than in a common law jurisdiction with full separation) and a claim against the property of the other spouse (shown by the prohibition against gratutitous alienation) which 'hardens' into a greater right on the dissolution of the marriage.

If the court is to use an approach to limited mutability based on 'vestedness' it should seek to identify 'vestedness' from the terms and incedents of the particular scheme involved in the case. The court should resist the temptation succumbed to above and refuse to accept broad classifications such as 'full community' or 'deferred community' as indicators or determinators of 'vestedness'. The court should, instead, take evidence to enable it to decide whether a spouse's rights under the matrimonial property system of the matrimonial domicile, say, should be enforced even after a change of domicile. A court may have to decide that 'vestedness' varies from purpose to purpose. For example, a spouse's rights under the marital property regime may be different for tax purposes than vis-a-vis the other spouse.[47] Similarly, 'vestedness' as against creditors may be held to be different from the 'vestedness' applied as against the other spouse.[48] Reference is made to NUENER:

> But ownership is only a bundle of rights and privileges. We must reckon with the possibil-

> ity that a different conflicts of laws rule may be applied to certain incedents of ownership.[49]

The court's determination of 'vestedness' will be based on evidence of foreign law. The task is not easy, as is shown by the difficulty courts of the same jurisdiction often have in determining what the nature of a spouse's interest in community property might be for tax purposes, for instance.[50] If courts are committed to a vested rights approach however they can only proceed in this analytical manner if they are to reach reasonable conclusions.

The doctrine of limited mutability has been accepted in the United States for over a century and a half.[51] There, however, the rule is stated in slightly different form than it is in Canadian or English works on conflicts:[52]

> Rights in personal property except rights acquired by creditors by attachment or otherwise, are controlled by the law of the marital domicile at the time of acquisition.[53]

One can see that this theory approximates to that set down by DICEY or by CHESHIRE but it may be thought to give more play to the law of a new domicile by taking emphasis off the need for rights to be vested before they will be enforced after a change of domicile. In the U.S. the theory is supplemented by the 'source' or 'tracing' doctrine. Basically, this states that when property acquired in domicile A and is then exchanged for other property in domicile B, domicile A's law continues to rule as to the ownership of the property as between the spouses.

VI. A Comparison of American and Canadian Treatment of Community Property.

It may be of interest to compare how the Canadian and the U.S. courts have handled community property rights. It has been established that the courts of both countries will recognise and enforce rights acquired under a 'community property regime' while a couple were domiciled in a jurisdiction which applied 'community of property' to the couple; the American court on the basis of its limited mutability rule, and the Canadian court either because rights under a community property regime will probably be held to be 'vested' or by application of the tacit contract theory.[54] There is a difference, however, in the method by which this is accomplished, or rather there is said to be.

LAY, in his discussion on the recognition of community property in common law provinces,[55] puts forward what may be regarded as the traditional U.S. view. He indicates that common law courts in the U.S., when recognising rights created under a 'community property regime' transform the right of the spouse from that of an interest in community property to a kind of interest more familiar to the common law. Thus, a community property interest becomes the right of a beneficiary under a resulting trust or a constructive trust. A wife's interest in community property acquired in Louisiana would be transformed into the right of a beneficiary under a constructive trust, the husband being the trustee, once the couple had moved, say, to New York.

MARSH[56] attempts to demonstrate that the view put forward here as the traditional one is not supported by authority. He cites other decisions of Louisiana and Texas courts which did, apparently, hold that "a change of domicile does not transform community property into some

other form of ownership.[57] These cases, however, do not come from jurisdictions which have separation of property and that fact may indicate that it is lack of judicial familiarity with community property concepts that leads common law courts to transmogrify community property interests into institutions such as common ownership or constructive trust. A common law court is more familiar with common law institutions.

LAY contrasts the Canadian approach which, he says, recognises community property as community property.[58] The reason for the difference, LAY suggests, may be that the Canadian courts deal with community of property created under the 'contrat tacite' of Quebec law, while the U.S. courts deal with community of property divorced from any notions of implied contract.

> The law of community property in the eight [community] states in the United States is designed to regulate acquisitions made by domicilliary spouses. It is not meant to perpetuate this type of property ownership between the parties for life.[59]

The implication is that the Quebec regime is meant to regulate parties' property relations for life. While U.S. courts will protect spouses' community property interests arising from a previous matrimonial domicile, U.S. spouses' instant property rights are governed by the law of the instant domicile and their rights are framed in terms of that domicile's institutions.

It is perhaps premature to praise the Canadian courts when all the relevant cases deal with the Quebec regime. One cannot say what would happen if a community property regime not employing the notion of the contrat tacite were involved.

The dangers of the U.S. approach are apparent. The incedents of

community property ownership under the law of Texas are not likely to be the same as those involved under the common law tenancy in common. The liability of the property involved for the obligations of the spouses is an example of an area where differences exist. While thrift in juridical concepts is a habit common lawyers are as well practised in as their civil law counterparts, conflicts of laws problems involving marital property would seem to be an area that calls for a truly catholic appreciation of the rights and incedents of ownership. The fitting of community property concepts into the institutions of the common law is a practice that may well do violence to both systems.

Footnotes to Chapter Four

I. Dicey op. cit. Rule II5 at 633., Cheshire, Private International Law, 8th edn. (I970) at 570, Castel, Conflict of Laws, Cases, Notes and Materials, 3rd edn. (I974) at 237, Anton, Private International Law, (I967) at 447.
Tallifer v. Tallifer (I89I) 2I O.R. 337 (C.A.), Re Parsons 29 O.W.N. 430 (I926), Re Tremblay (I93I) O.R. 78I (H.C.), Devos v. Devos [I970] 2 O.R. 323 (C.A.), Re McCarthy (I970) I6 D.L.R. (3d) 72 (Probt. Ct. N.S.).

2. Dicey op. cit. at 638.

3. ibid. at 638.

4. Devos v. Devos op. cit., Re Jutras [I932] 2 W.W.R. 533, where the form of the contract pointed to an intention that the proper law of the contract should be the law of Quebec and not the law of the matrimonial domicile.

5. Dicey, Conflict of Laws, 5th edn, (I932) at 598.

6. Cheshire, Private International Law, 4th edn. (I952).

7. ibid. at 492. Earlier editions of Cheshire's work put forward the intended matrimonial home theory more strongly than recent editions.

8. [I956] Ch. 593.

9. ibid. at 607

I0. [I900] P. 2II.

II. op. cit.

I2. ibid. at 536; See also Pouliot v. Cloutier [I944] S.C.C. 284 where a woman domiciled in Quebec married a man domiciled in New Hampshire. New Hampshire was taken to be the matrimonial domicile.

I3. Story, Commentaries on The Conflict of Laws (I834) pp. I62 et. seq.

I4. Goodrich, Matrimonial Domicile (I9I7) 27 Yale L.J. 49, and Notes 43 Harv. L.Rev. I286 (I930) and Harding, Matrimonial Domicile and Marital Rights in Moveables, (I939) 30 Mich. L. Rev. 859 and the cases cited therein.

I5. I950 (I) S.A. 220 (A.D.). See also Radwan v. Radwan [I972] 3 W.L.R. 930 and Feiner v. Demkowicz [I973] 2 O.R. (2d) I2I, 42 D.L.R. (3d) I65 (H.C.), which, though in the context of capacity to contract a polygamous marriage, do give support to the intended matrimonial home doctrine.

16. op. cit. at 563 - 564.

17. An alternative to both theories is suggested by Goodrich, Handbook of The Conflict of Laws, 4th edn. (ed. E.F. Scoles) (1964) at 248 : "Full recognition of equal property rights of the spouses would seem to indicate that marital rights of a spouse in the moveables of the other should be determined by the law of the domicile of the owner at the time of marriage." Apart from the logical difficulty that each spouse's rights springing from the (one) marital relationship can only be regulated by one system of law, one has the attendant practical difficulty of the possible conflicts of rules of marital property and of conflicts of conflicts rules, if each party is from a different domicile.

18. Dicey op. cit. Rule 117 at 644.

19. (1891) 18 R (H.L.) 72, [1891] A.C. 639.

20. op. cit. at 344. See also Re Klaukie's Will (1873) I B.C.R. (Pt. I) 76.

21. ibid.

22. op. cit.

23. ibid. at 241.

24. [1900] A.C. 21 (H.L.)

25. [1900] 2 Ch, 410.

26. i.e. the matrimonial regime that applies between the parties in the absence of any stipulation by the, to the contrary.

27. op. cit.

28. ibid. at 356.

29. The typical immigrant case would be an ideal example of a situation where Cheshire's matrimonial home doctrine would be useful. Often immigrants only make one move after marriage - to the host country - and often the intention to move is carried into effect soon after marriage.

30. Dicey op. cit. Rule 118 at 647.

31. Cheshire op. cit. at 570.

32. (1962) 40 W.W.R. 152, 36 D.L.R. (2d) 177 (B.C.).

33. ibid. at 158 - 159.

34. Castel, Canadian Conflict of Laws (1975).

35. ibid. at 241.

36. See Castel, Droit International Prive Quebecois, Recueil de textes choisis, (no date).See also Kelada, Conflit de Lois (1974), Regle 23 and Regle 24 at 137 and Johnson, Conflict of Laws (1962) 2nd edn. page 331.

37. Castel ibid. at 173.

38. Lay, The Recognition of Community Property in The Common Law Provinces (1969) 34 Sask. L.Rev. 264 at 276.

39. (1804) 4 Paton 581.

40. De Nicols v. Curlier op. cit.

41. Clive and Wilson, The Law of Husband and Wife in Scotland (1974) at 286.

42. op. cit. at 29.

43. See for the source of Halsbury's views on the Scots system, Lord Fraser, Husband and Wife According to the Law of Scotland (1876-1878) 2d edn., vol. I Ch.9 pp. 648-678. But c.f. Viscount Stair, The Institutions of the Law of Scotland, (1832) 5th edn.I:4:9. It is the opinion of J.J. Robertson of the Faculty of Law at the University of Dundee that Stair's view is the better one, at least until the beginning of the nineteenth century.
"According to the nature of society, there is a communion of goods betwixt the married persons, which society, having no determinate proportion in it, doth resolve it into an equality...."(Stair).

44. Walker, The Scottish Legal System (1963) 2d edn. at 87.

45. op. cits.

46. vide ante n. 25.

47. See e.g. Leflar, Community Property and the Conflict of Laws, (1933) 21 Calif. L.Rev. 221 at 227 and the cases cited in his footnote 25. "So the separate interests of the spouses in community property have been held to be such vested estates that separate federal income tax returns on the profits therefrom may be insisted on by the spouses."

48. op. cit.

49. ibid. at 172.

50. Reference may usefully be made here to the extensive discussion regarding a wife's interest in the community regime of Louisiana following the decision of the Louisiana Supreme Court in Creech v. Capitol Mack Inc. 287 So. (2nd) 497 (1973) : Songy, Creditor's

Rights and the Community of Gains, 34 La. L. Rev. 874. Foster, Recent Cases, 20 Loyola Law Rev. 355 : Kolb, op. cit..

51. Saul v. His Creditors 5 Mart. (n.s.) 569, I6 Am. Dec. 2I2, La., (I827).

52. Deering, Separate and Community Property and The Conflict of Laws, (I958) 30 Rocky Mountain Law Rev. I27.

53. ibid. at I29

54. It is recognised, of course, indeed it is urged, that these two concepts are inter-related.

55. op. cit. at 27I-274.

56. op. cit. at 239-244.

57. ibid. at 243.

58. op. cit.

59. ibid at 273.

PART TWO

The next three chapters will consider some of the conflicts of laws problems that will arise should the proposals outlined in the second chapter become legislation. The main areas of exploration will involve choice of law problems and the applicability of the Alberta regime - when will a court apply the deferred sharing regime?

It will be useful to discuss applicability in two broad contexts. The first will involve the working of the Alberta regime in relation to the other provincial matrimonial property laws as they now stand, (i.e. with most of the provinces having a version of separation of property, the notable exception being Quebec). This discussion will take up the major part of the two succeeding chapters. The sixth chapter of this thesis will discuss some of the conflicts problems that will arise should the regime proposed for Alberta have to operate alongside the regimes being proposed for other of the common law provinces.

A comment may be made before embarking on the main discussion. As our thesis progresses it will become apparent that some emphasis is being put on the case that involves relevant foreign elements taking place in Quebec. There are more than academic reasons for this emphasis. Should separation of that province occur, or even if the allegedly 'Anglo-phobic' policies are continued in Quebec, there is almost certain to be an influx of Anglophones into the common law provinces. Many of these ex-Quebeckers will be professional in occupation and will have

acquired considerable assets during married life. Most of them will have had their matrimonial domicile in Quebec.

In mid-April of 1977 each of the provincial governments of Canada was asked by the writer to supply details of any recent or proposed changes in their matrimonial property laws. All of the provinces replied, but relatively few were able to give details of proposals concrete enough to be useful to this study. Of the remaining provinces, all except Quebec indicated that they were considering reform of their matrimonial property laws. Prince Edward Island and New Brunswick indicated that reforms along the lines of the proposals put forward by the Ontario Law Reform Commission were being studied. British Columbia and Newfoudland gave no indication of the types of reform they were considering.

CHAPTER FIVE

APPLICATION OF DEFERRED SHARING : THE HINGE-PINS OF APPLICABILITY

I. Recapitulation.

The regime proposed for Alberta is a deferred sharing regime. It will commence upon the marriage of couples who are resident in Alberta at the time of their marriage. The regime will apply, of course, only to the gains of couples made after the couples' marriage. In the case of couples already married and living outside Alberta, we have already seen how the Alberta regime will apply to all the shareable gains of such a couple as from the date of their marriage once such a couple establish a common habitual residence in Alberta. The regime is declared not to apply to couples whose last common habitual residence was outside Alberta. Application of the Alberta regime is excluded if a couple are "already subject to deferred sharing".

What is the import of the terms upon which application of the Alberta regime hinges -'resident'and'habitually resident'?

II. Residence.

Seeking to put some doctrinal flesh on the bare bones of the term 'resident' we are faced first with DICEY's statement that "the word 'residence' has different meanings in different branches of the law"[1] CASTEL is no more helpful. He takes as his starting point the Second Restatement[2] - "Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case"[3]. The complexion put on the word will therefore vary depending on whether one is construing it

in a tax statute, an adoption act or in an enactment relating to the hospital charges of indigents. For our purposes the word occurs in the context of a marital property statute and that must be our starting point.

It has been shown that marital property rights are usually governed according to the concept of domicile. Residence, however, is usually taken to mean something less than domicile. For instance, to establish residence, as opposed to domicile, one need not establish animus manendi or the intention to remain permanently or indefinitely in a country. Length of time is not primarilly important in determining if a person is 'resident' though it will be relevant to show animus residendi or the intention to reside. The animus required for residence in this context is only that degree of intention to reside as is required to show that presence is not transitory or fleeting.[4] Exploring the meaning of the term 'residence' simpliciter we find that it is not taken to be an exclusive term. "A man may reside in several places ar once".[5] To establish residence one need not own or rent a house in the relevant jurisdiction. A temporary stay in a hotel or in the house of a friend will be sufficient if other indicators show an intention to stay in the locality.[6]

The texts distinguish 'ordinary' and 'actual' residence. These terms are used as jurisdictional criteria under the Divorce Act[7] but they are not the term used in the majority report of the Alberta Institute. Are there any grounds for drawing analogies between the hinge-pins of the application rules of the Alberta regime and the terms upon which the jurisdictional rules of the Divorce Act rests?

One must assume that the use of'residence' simpliciter, opposite

'common habitual residence', is intentional. From this one can draw the conclusion that the two terms are taken to mean something different. This, in turn, leads one to speculate whether 'residence' is taken to mean something less than 'habitual residence' - less in the sense that a less permanent or less durable connection between a person and a locality need only be established when one is seeking to prove that a person was resident, than if one is seeking to prove that he was habitually resident. The qualification 'habitual' would seem to draw the quality of residence required for married couples coming into Alberta closer to that of domicile, and away from that of actual residence or mere presence.

There is a line of English cases decided in connection with the Matrimonial Causes Act[8] which holds that 'residence' simpliciter means actual residence.[9] It is put forward here that residence simpliciter is closer to actual residence than, say, habitual or ordinary residence. However, the rationes of the English cases actually involve the proposition that where residence simpliciter is juxtaposed with ordinary residence it may be taken to mean actual residence. This qualification may not mean too much for our purposes when one considers that the Institute's report juxtaposes residence and habitual residence, but one qualification that does bear mentioning is the first point made in this discussion. Residence has various meanings which change according to the context in which the term is used. In the English cases the term construed is used in a jurisdictional rule and the considerations that prompted the judges in those cases to put a certain complexion on residence may not be relevant when one considers the term in a matrimonial property statute. A jurisdictional rule is concerned primarily with

with effectiveness and securing international recognition; the applicability rule for the Alberta regime must take the fostering of social justice as its first consideration. The Alberta court could be instructed by the matrimonial property statute to apply the Alberta regime to all and sundry who came before it - and such a rule would be effective in Alberta. The point is - who should the regime be applied to? What persons are sufficiently connected with the province to have its laws govern the property relations of a long-standing relationship?

If we accept that residence simpliciter may bear a resemblance to actual residence, can we further divine its meaning? The test of residence has been described as a mixed one of fact and law. Rules such as 'presence casually or as a traveller will not be sufficient to establish the intention necessary for residence' are put forward. However, it is unlikely that, with regard to the test laid down in the Institute's report, the courts will be trapped by conceptualism and spurious rules. The attitude will probably be adopted, in true common-law spirit, that a judge will be able to recognise in any particular case, whether someone is resident in Alberta or not for the purpose of visiting the benefits of deferred sharing on him or her, and that without the benefit of a host of rules and tests. It is also true however, that the fact that the term 'residence' has been left unqualified in the applicability rule opens the way for it to gather the encrustations of the rationes of decided cases more readily than if a more precise formulation had been employed. It is the experience of the common lawyer that these encrutations do not always fit neatly together to form a pattern upon which clients' rights can be readily and accurately assessed. In this instance

such a course would be unfortunate, as spouses' marital property rights are important to the people involved. To lay the way open for more trouble at a time when relations between the parties are usually strained is at least unwise, especially when a more precise formulation of the test of applicability might go a long way to solving the problem.

To return for a moment to what was said about construing a term in its proper context, an intelligent parallel can perhaps be drawn between 'residence' as used in the Institute's report and 'cruelty' as used in the context of the divorce laws. Although the precise meaning of 'cruelty' may change with each decided case, it is clear that the purpose of a characterisation of a spouse's conduct as 'cruel' is not to visit that spouse with moral opprobrium. The purpose is to provide matrimonial relief.[10] The meaning of the term would be different were it contained in a criminal or a reparation statute. Purpose does give meaning.

If a couple are found by an Alberta court to be resident in Alberta at the date of their marriage their property rights will be governed by the Alberta regime, provided they have not acquired a last common habitual residence elsewhere since the time of the marriage. The consequences of a finding of residence in Alberta, therefore, may be fairly far-reaching. The results will be serious and long-term. It is submitted therefore, that the criteria of residence in this context should be strict; stricter, for instance, than the test adopted for our indigents' hospital charges,[11] but not as strict as the test adopted in citizenship applications.[12] It is further suggested that a test akin to that of domicile be adopted in determining whether the Alberta regime

should apply to a couple, minus the emphasis on the intention to stay indefinitely. There is another consideration which would make a strict test of residence at least convenient. As our discussion progresses it will become apparent that the conflicts problems arising in relation to the marital property rights of a couple will increase geometrically, as it were, the looser a test of residence gets. There may be more instances of a couple claiming that the Alberta regime applies to them, the looser the test relating to the hinge pins of its applicability are.

We say that a strict test is desirable but recognise that if the report's recommendations are enacted as they stand, the courts will probably construe residence to mean 'actual residence'. The only sure way of having a strict, workable test is if the term is changed or defined strictly in the legislation.

III. Habitual Residence.

Concentrating now on the term which governs the application of the Alberta regime to married couples coming into the provice and which provides the cut-off point for those couples who move elsewhere, namely habitual residence, we find ourselves dealing with a term that has had very little judicial or doctrinal treatment. In one of the few articles alluding to the concept, LIPSTIEN [13] tells us that what the words mean is a pure question of fact. The habitual qualification has the purpose of making the legal meaning clear and is to bring the determination of whether one is or is not habitually resident exclusivelly within the competence of the trier of fact. One would therefore imagine that there is less scope for rule-making here than there is in the case of residence simpliciter. DICEY "hazard[s] the guess that it will be held to mean

much the same thing as domicile, minus the artificial elements in that concept...i...and minus the stress placed on the element of intention in domicile".[14]

Reference is made to the comments contained in an article by Clifford HALL[15] on the case of Cruse v. Chittum.[16] The extensive discussion of a very short judgement by Lane J. concludes that:

> As a concept dependent largely upon the assessment by courts of the relevant facts, the absence of certainties inherent in the mechanical application of fixed rules, present substantially even in domicile, must inevitably work hardship to those aspirants, who must conjecture their relationship with a country's laws to a degree otherwise unknown.[17]

The conclusion is concurred in and the comment is made here that this case does little to illuminate the concept of habitual residence. It is true that Cruse v. Chittum was the first English case to deal with habitual residence as such,[18] and Lane J. may have been hesitant to wander into the jurisprudential desert without the pillar of fire provided by precedent, but some of the submissions of counsel which he adopted do need qualification.

Habitual residence was said to be equivalent to the residence required for domicile, minus the mental elements necessary to establish domicile. This cannot be a general rule, for in the case of domicile, residence for only part of a day will constitute the necessary residence, if the other facts show the necessary animus.[19] Lane J. himself accepted that "habitual residence in this context.....denotes a regular physical presence which must endure for some time".[20] While we hold to what we said earlier regarding a term in its context, we submit that for our purposes habitual residence will require a degree of physical presence for some

time. It is believed that an analogy with the residence required for domicile is not helpful. If domicile is to be useful to us we must, as was the case with residence simpliciter, accept some of the tests of intention that accompany it. By this we do not mean that an intention to stay indefinitely must be established to establish habitual residence, but that there must be an intention to remain in the jurisdiction in question. Just how 'remain' is defined by the court will be a matter of speculation, but the sort of factors that are taken into account when establishing intention to remain indefinitely in domicile, will be useful.

The court in Cruse v. Chittum was concerned to establish the validity of a foreign divorce under the Recognition of Foreign Divorces and Legal Separations Act.[21] Under that act a divorce will be recognised if the petitioner is habitually resident in the granting jurisdiction. Since Cruse v. Chittum another English case has dealt with habitual residence as contained in the same act.

Hack v. Hack relies on Cruse v. Chittum and does not add much to the earlier case.[22] The facts of the case, however, may be of interest to show the circumstances in which someone will be held to be habitually resident. Mr. Hack left his home in England (and Mrs. Hack) to work in the United States, initially for a period of one year. He had the prospect of a second year of employment there. He travelled to the U.S. on a visitor's visa. He accepted the second year of employment and resolved to make his life in the U.S.. Two years after leaving England he applied to become a permitted immigrant. During the period from August 1969 to March 1971 he made various expeditions both within and outside the U.S. He returned to the U.K. in the summer of 1972 after petitioning for

divorce in Missouri - the state in which he had his job and his place of residence. His post there was kept open for a year. Arnold J. held that Mr. Hack was habitually resident in Missouri.

In Hack there were probably facts sufficient to justify the court in holding that the husband was domiciled in Missouri. In so far as this is true, the case does not tell us what facts will justify a finding of habitual residence where a finding of domicile would not be possible.

When residence simpliciter was being discussed we looked for analogies between it and actual residence. The other test of jurisdiction in the Divorce Act is 'ordinary residence'. Habitually resident may be thought to bear some relationship to ordinary residence. Keeping in mind our original point about construing breeds of residence in their proper environment, it is thought that habitual and ordinary residence do have a considerable area of overlap. Both kinds of residence indicate a relationship between the person and the jurisdiction of a more durable nature than that involved in actual residence or, in what will probably be the court's construction of, residence simpliciter.

It is also submitted, however, that ordinary residence has a degree of exclusiveness about it that is not present in habitual residence. Just as there is one norm or ordinary course of events, so a man will have one ordinary or normal residence. But a man or a woman's life may be so ordered that he or she could be said to be habitually resident in two places at the same time. No doubt in such a case, a court, if pressed, could find which of these places was the 'normal' residence or the 'ordinary' residence. That does not prevent two contemporaneous habitual residences existing for one person.

The concept of habitual residence came originally from Hague Conventions on Private International Law and its purpose was to provide a compromise between the concepts of domicile and of nationality so as to make the Hague Conventions acceptable to as many countries as possible. Some countries use domicile as a point of contact in matters of personal status etc., while some use nationality. It will be appreciated that nationality would not be a suitable point of contact for the Institute's regime, Canada being a federation. It is probable that the Institute wished to avoid the artificiality of domicile becoming a part of its proposals. The use of residence and habitual residence will give rise to some problems however.

The point has already been made that neither residence nor habitual residence are necessarily exclusive. If the matrimonial property proposals of the other provinces use these concepts as key points of contact there could be difficulties. Cases can be conjured up where a person could be held to be resident in one province and habitually resident in another. This is especially true if residence is taken to mean actual residence. More unlikely but stll possible, and even more disconcerting, is that one can imagine cases where a person could be held to have two habitual residences at the same time.

IV. Examples of Problem Cases.

Some examples might serve to illustrate the points made above. Take the case of a middle-aged fire watcher employed every year from May until the end of August to stay in a remote shack in Banff National Park and to scan the horizon for smoke. Each winter he might return to Vancouver to stay in the home of a near relative or in rented accomodation,

to work as a fisherman. Who would say that, all other factors being evenly balanced, and the practice continuing over a number of years, that he was not 'habitually resident' in both provinces? A parade of horribles can be made up with the use of seasonal workers, those with holiday cabins (and the time to spend all summer in them) and prairie farmers who pack up every fall and go down to San Diego till seeding time comes around again.

One could imagine a person being habitually resident in one province yet domiciled in another. Make the fire watcher a married man with a house and family in Vancouver who works as a law professor in the University of British Columbia. He may retire each year to his mountain top to put the finishing touches to treatises on bills of exchange. It is not unusual for people to spend long periods away from the place they would consider 'home' each year.

It will be appreciated that it is quite possible for a person to have more than one residence and for him to be described as a resident of more than one province at the same time. This will be less likely if 'residence' is taken as having a complexion similar to actual residence - which will probably be the eventual holding of the court if the term is left unqualified. However we have indicated that such a construction would not be a desirable one. The fact that a couple had their actual residence in Alberta at the time of their marriage and have acquired no common habitual residence elsewhere or in Alberta may not be sufficient grounds for fixing their marital property relations according to the Alberta regime.

V. Interaction of the Divorce Act and The Alberta Regime.

The fact that the characters used to mark out the boundaries of the regime's applicability are capable of sharper definition is a serious defect in the Institute's scheme. The fact that they may not be exclusive will cause problems. It will be the case that the normal occasion calling for a termination of a regime will be a decree of divorce. It will also be the case that in most cases where a person or a couple satisfy the jurisdictional requirements of the Divorce Act[23] they will be habitually resident in the same jurisdiction. However this will not always be so. There is the indisputable fact that the words used in the Divorce Act and in the proposals for the Alberta regime are different. Actual and ordinary residence are not the same as residence and common habitual residence. When one considers the interpretation put on the Divorce Act by judges like Nikitman J. in Wood v. Wood[24] one can see it becoming more likely that a person could satisfy the jurisdictional requirements of the Divorce Act yet not be habitually resident in the same province as one was petitioning for divorce in.

Yet even if the jurisdictional test for divorce was congruent with the applicability rule for the deferred sharing regime, would that solve very much, and, even if it did, would that be a solution to our choice of law problem that should be given play?

Answering our second hypothetical first, it does not seem socially desirable that a person's marital property rights should depend on the place where he or she raises his or her action of divorce. In many cases the forum will be one of convenience and the petitioner will have no connection with the granting jurisdiction other than that stipulated in section 5 of the Divorce Act. Granted this test of jurisdiction

is not an illusory one and that , in most cases, domicile, habitual residence, ordinary residence and residence will coincide. But for the not inconsiderable number where this is not the case, it seems pointless to let marital property rights follow the forum when there might be another jurisdiction that has a better 'claim' to rule on these rights - the parties having lived there for most of their married lives, for instance.

It is also true that squaring the divorce jurisdictional rules with the application rules of the regime would not solve very much. Firstly, divorce, of course, is not the only occasion calling for a termination of the regime. A termination is also called for on decree of nullity, judicial separation and on joint application of the spouses etc..

Secondly, it is not unusual for couples to stay apart before divorce, indeed it is the norm. Often their separate lives will lead them to stay in different provinces. One spouse could find himself being divorced in say, Manitoba, by a spouse who had established jurisdiction there. If the couple had had their last common habitual residence in Alberta, and the respondent retained that as his habitual residence, what law would regulate their marital property rights? There is no assurance that Manitoba would apply the law of the 'last common habitual residence' as to the parties' property rights. Yet, the respondent, if he had raised an action first in Alberta, and not discontinued it within thirty days,[25] would have won the 'choice of forum' fight and the Alberta regime would be applied by the Alberta court as Alberta was the last common habitual reisdence of the parties. To allow marital property rights to depend on who raises the action where cannot be recommended as the solution to our choice of law problem.

Footnotes to Chapter Five

I. Dicey op. cit., at 95. See also McCuaig v. Hinds (I909) II W.L.R. 652 (Man.) per Marshall P.M. at 654 : "The word residence is ambiguous. It has been given judicial interpretations during the last century according to the intent of the particular document or legislation wherein it was found."

2. American Law Institute, Restatement of the Law Second, Conflict of Laws 2d, (I968) Comment (K) to section II.

3. Castel op.cit., (Casebook) at 98.

4. See J.D. McLean, The Meaning of Residence, (I962) II I.C.L.Q. II53.

5. Sinclair v. Sinclair [I968] P. I89 per Scarman J. at 232.

6. Dicey op. cit., at 98.

7. For an analysis of the cases see Power, On Divorce etc., 3rd edn., (I976) by C. Davies, Chapter 8.

8. (U.K.) I950 Ch. 25, Section I8 (i) (b).

9. Stransky v. Stransky [I954] 2 All E.R. 536, Lewis v. Lewis [I956] I W.L.R. 200, R. v. Edgehill [I963] I Q.B. 593.

I0. The comments of Lord Stott of the Scottish Court of Session, a judge with long experience in divorce matters, might be of interest here: (from an unreported, defended, action of divorce in the Court of Session in the autumn of I974) "It remains only to say that this is another of these cases in which the defender has no interest in maintaining the marriage and which in all probability would never have been defended but for its designation as an action of divorce on the ground of cruelty. The nuances of the term 'cruelty' are familiar to lawyers but to the lay mind the term may well have a more sinister connotation and it is not surprising that a defender even if recognising that his conduct has been such as to justify a decree of divorce should demur to having himself stigmatised as cruel. The result as it seems to me is a considerable waste of judicial time and public money which might well have been saved if the terminology of divorce had not failed to keep pace with the development of the law and the everyday practice of the courts." (Scots Law Times (News) page 244, I974)

II. See e.g. Toronto East General Orthopaedic Hospital v. Ontario County [I947] O.W.N. 5II, (I947) 2 D.L.R. 766 (Ont. C.A.).

I2. See e.g. and compare Re Bauer (I976) I0 National Reporter 93 (Citizenship Appeal Court).

I3. Lipstien, The Tenth Session of the Hague Conference on Private

International Law, I964, [I965] Camb. L.J. 224.

I4. Dicey op. cit., at 97.

I5. Hall, Cruse v. Chittum: Habitual Residence Judicially Explored, (I975) 24 I.C.L.Q. I.

I6. [I974] 2 All E.R. 940.

I7. Hall, op. cit., at 30.

I8. The case of Re Banff Election - Brett v. Sifton (I899) 4 Terr. L.R. I40, is cited in the 'Abridgement' as dealing with habitual residence. The case, however, deals only with residence simpliciter, and Dicey's early definition of it as being 'a person's habitual physical presence...'

I9. See White v. Tennant I888, 3I West Virginia 790 (Cheshire, op. cit., at I03).

20. [I974] 2 ALL E.R. 940 at 943.

2I. (U.K.) I97I Chap. 53. (There are, of course, other grounds of recognition under the I97I Act and at common law).

22. (I976) Vol 6, No. 6, Family Law at I77.

23. Divorce Act R.S.C. I970 c. D-8 (as amended) : Section 5 (I).

24. (I958) 2 R.F.L. (Man. Q.B.) 48. Nikitman J. held that ten months of actual residence does not refer to a period of one year immediately preceding presentation of the petition, but to ten months in the period of at least one year immediately preceding presentation of the petition. See also MacPherson v. MacPherson (I976) I3 O.R. (2d) 233 where the Ontario Court of Appeal approved the decision in Woods.

25. Divorce Act op. cit., Section 5 (2).

CHAPTER SIX

APPLICATION OF DEFERRED SHARING : CHOICE OF LAW PROBLEMS

I. Introduction

So far we have been concerned to outline some of the problems that may be caused due to the inadequacy of the hinge-pins of the scheme's applicability rules. The discussion now goes on to examine another fault in the application rules - a substantive fault, as it were. This fault, coupled with other factors, will give rise to serious problems of its own.

The Alberta regime is declared to apply to couples who have had their last common habitual residence in Alberta. This rule excludes application of the Alberta regime to those people who have their last common habitual residence elsewhere. The rule is one of total mutability - the regime applies to the acquisitions of a couple since the time of their marriage. The policy arguments against total mutability have been gone into already. It is not a rule that is calculated to ensure justice between couples, given the disparity between the matrimonial property laws of the provinces. This disparity will be even greater if Alberta happens to be alone in her reform of the law.

The rule which prevents application of the Alberta regime where couples do not have their last common habitual residence in Alberta would be just if all of the provinces had equally just matrimonial property laws. Rights once held under the matrimonial property law of one province could be lost and replaced by equal rights under another law after a

change of home. But the laws of all the provinces are not the same.

The rule, it can be surmised, is designed to prevent the incursion of Alberta's regime into 'other province's territory', but an example will show how futile its results could be.

A couple might marry in Alberta while resident here and live for forty years in this province under deferred sharing. On their retirement they might resolve to spend their twilight years in the bracing climate of the Maritimes. On the acquisition of a common habitual residence there in furtherance of their desires, the Alberta regime would, by the law of Alberta, no longer apply to them. Suppose that the bracing climate of the Maritimes leads the husband into marital infidelity and a divorce action is raised in the court of their new home. Would the fact that the couple had spent much the greater part of their married life in Alberta, under deferred sharing, count for nothing? Would the couple be held separate as to property on divorce in accordance with the laws of the granting jurisdiction, supposing it to be Newfoundland or some other province with separation of property in force?

The problems consequent to the court of another province trying to apply the 'law of Alberta' to a couples' property rights are gone into later. Such problems only arise when the forum is concerned to apply the law of a previous matrimonial domicile or common habitual residence. What we will examine here is whether or not there will be a choice of law problem before the the foreign forum involving the law of Alberta in the kind of case outlined above.

II. Deferred sharing and the Choice of Law : Foreign Courts

In the United States it is well established that the 'community

property regimes' of the eight 'community property' states only apply to domiciliaries of these states.[1] This was the rule laid down in Saul v. His Creditors,[2] and we have already seen how the rule for Canada cannot be stated with as much precision. While all of the U.S. jurisdictions have rejected the tacit contract theory,[3] the only cases in Canada that deal with community property regimes are those that involve express acceptance of a regime by contract[4] or that involve the legal regime of Quebec.[5]

Quebec, of course, employs the notion that the regime legal applies between spouses, where they do not opt for one of the contractual or conventional regimes, as if the spouses had tacitly agreed to the legal regime. The regime prescribed by the Civil Code to apply in those cases where there is no election is said to apply between the parties as a contrat tacite. In matrimonial property cases involving the Quebec regime, therefore, we have seen how the court of another jurisdiction will apply the Quebec regime as to acquisitions of the parties after a change of domicile from Quebec. If couples marry under the Quebec regime it is recognised in the other provinces that vested rights can exist as to future acquisitions.

The common-law provinces that propose to enact deferred sharing regimes or versions thereof, in general, and Alberta in particular, are proposing to enact regimes similar in effect to the 'partnership des acqets' of the civil law. The common law provinces do not have a civil law tradition however, and one must wonder how much, if any, of the doctrine associated with the civil law concept of community property is intended to be transplanted to the common law provinces concerned. The problem is a nice one, consequent to the adoption of a civil law insit-

tution into an alien jurisprudence.

It can be argued convincingly however, that even if the notion of a tacit contract survived the trek west with the community band wagon, it is not an idea that should hold much sway in the choice of law process. KUHN[7] sets it out well:

> Thus the French rule adopts the principle of a "tacit consent" of the parties in the choice of law. The principle is carried out logically in regard to the substantive provision of the French Code in respect to marital property where no conflict of laws is involved, because it is expressly provided that if parties do not enter into a special contract at the time of marriage regulating their property relations, a fixed statutory community will be taken to have been tacitly agreed to. But does the assumption of a tacit contract accord with the probable facts? It probably does in so far as it concerns a property relationship between husband and wife fixed in detail by a system of longstanding and known to the people generally. On the other hand, so far as it refers to the choice of a system of law where there is a conflict between two or more possible systems, it probably does not. Only in rare cases will the parties have sufficient knowledge of the alternatives to think of any definite solution, especially at a period of life when the amount of their property may be very small.[8]

The theory of the matter apart, the submission here is that there is not sufficient jurisprudence on community property in Canada to warrant the assumption that courts of other jurisdiction will not recognise the Alberta regime as a species of community property and apply it after couples are no longer resident in this province. The rule which states that the regime is only to apply to couples as long as Alberta was the last common habitual residence of the couple may be circumvented by other courts applying the notion of a tacit contract and a theory of immutability. Although it has been submitted that the rule which prevents application of the Alberta regime or, rather, which is designed to preclude its application, is one which will cause injustice, the medium

of the tacit contract is not seen as the best way to correct this fault. It has been criticised as lacking a strong theoretical foundation as it relates to the choice of law process and, in addition there is no certainty that all other jurisdictions will apply it. It is also felt that immutabilty, which is the consequence of a tacit contract approach, can be criticised as strongly as total mutability. We refer to the points made in chapter 4.

What must be found therefore is a via media whereby the courts of other jursdictions can give effect to the legitimate expectations of couples who have lived for a long time under deferred sharing. Something mid-way between the Scylla of total mutability and the Chaybdis of total immutability is required. We will see if there is anything in the cases we mentioned when discussing the choice of law rules in Canada that may be of use to us.

III. Application of the Common Law Rules to the Choice of Law Problem

The rule laid down in Re Heung Won Lee Estate[9] was that the rights of husband and wife in moveable property were governed by the law of the domicile at the time the moveable property involved, was acquired. In reaching this decision Verchere J. was guided by a dictum from the case of Pink v. Perlin[10] to this effect:

> The law appears to be that the mutual rights of the husband and wife as to personal property are governed by the law of the matrimonial domicile, and such rights are not affected by a subsequent change, but rights acquired after such a change are, of course, governed by the law of the actual domicile.[11]

Was the court in Re Heung Won Lee laying down a kind of limited mutability rule, similar to the one employed in the United States? Would such a

rule enable courts of other jurisdictions to order the affairs of couples who had had a common habitual residence in Alberta, according to the Alberta regime, at least in so far as property acquired during common habitual residence in Alberta was concerned?

In answer to this question, it may be thought that this too would not be a satisfactory way round the injustice caused by the applicability rule. During the continuance of the Alberta regime a couple acquires no "rights" in each other's property. The couple are separate as to property until the termination of the regime. For a court to hold that a couple had "rights" in each other's property might be thought to do violence to the theory of the regime, and even to contradict the name used to describe the system.

It is submitted however, that the injustice and inconvenience which would be caused by a strict application of the regime's applicability rule will be so serious that it will justify a limited mutability approach along the lines described above. The route to such a circumvention of the Alberta application rule could take one of the following paths. The court could retain the emphasis on "rights" that seems to be a part of all the dicta on the area but could, at the same time, revise its conception of that term. The court could hold that a couple living under the deferred sharing regime did have rights in each other's property, as is shown by the prohibition against gratuitous alienation, and by the right to apply for a sharing on the dissolution of the marriage.

Alternatively the court could take the emphasis off of "rights", vested or otherwise, and apply the law of Alberta to the acquisitions of a couple while they lived in Alberta. If the court had to evolve its

own rule to deal with the inequity of the application rules of the Alberta regime,we would recommend the second approach. We recognise that this approach does have its difficulties - the renvoi problem we set out below is one aspect that could be a major stumbling block to judicial evolution of a solution along these lines. We also recognise that in those cases where the couples' one-time common habitual residence was in Alberta, but their matrimonial domicile was not, the foreign forum would, using the accepted, traditional, connecting factor of matriomonial domicile, be unable to consider the law of Alberta at all. The court's choice of law rule in such a case would preclude application of the 'law of a common habitual residence' in preference to the 'law of the matrimonial domicile'.

The second approach is preferred because it does take the emphasis off "rights". The traditional emphasis on rights is seen to be a result of the influence of the tacit contract. Once that is recognised, and once it is accepted that that concept has no place on Alberta's law on matrimonial property,one can move towards formulation of a limited mutability rule similar to that shown to be servicable in the United States. That is a true limited mutability rule which gives adequate consideration to each of the laws a couple may have had a relevant connection with.

The alternative to judicial circumvention of the application rule of the Alberta regime would involve amendment of the applicability rule. That might be thought to be a preferable avenue of improvement - the scheme being amended openly to achieve the same effect as the U.S. rule of limited mutabilty, instead of by 'judicial slight of hand'.Open amendment of the application rule of the scheme will also avoid any renvoi

difficulties. A simple illustration will suffice.

Suppose a couple are resident in Alberta at the time of their marriage and thereafter spend thirty years of married life in this province. Suppose that they then moved to Saskatchewan and acquired a common habitual residence there and that sometime after that they came before a Saskatchewan court for the purpose of divorce. Suppose further that during their stay in Alberta the couple acquired moveable and immoveable property in this province and that they still owned immoveable property in Alberta at the time of the divorce proceedings.

If one of the parties claimed that he or she had a right to the land in Alberta,[12] which law would the Saskatchewan court seek to apply? It is assumed that the Saskatchewan court would assume jurisdiction in the dispute in so far as it related to land in Alberta. Reference is made to DICEY[13] and to CASTEL:[14]

> The recognition by Canadian courts of the exclusive jurisdiction of the courts of the situs has not prevented them from exercising equitable jurisdiction in personam. They will grant decrees imposing a personal obligation on a defendant with respect to contractual or equitable obligations arising out of a transaction involving a foreign immovable.[15]

Saskatchewan would not apply its own law - apart from any of the policy reasons set out above because real property in Alberta was involved. See DICEY.[16] The Saskatchewan court would attempt to apply the 'law of Alberta'. What would the law of Alberta be? The Saskatchewan court would seek to apply the law that the Alberta court would apply in the same situation,[17] so as to avoid a brutum fulmen, or a judgement that cannot be satisfied. The Alberta court would not apply the deferred sharing regime of Alberta in this case because the couple did not have their last common habitual

residence in Alberta. Would the Saskatchewan court be forced to apply Alberta law without the deferred sharing regime, which is the common law of separation of property? This would surely be an absurd and inequitable result.

The law applied by an Alberta court to couples whose property relations are to be regulated by 'the law of Alberta; but who did not have their last common habitual residence in Alberta, is more fully gone into in the next section of this discussion, but we may anticipate what is said there in order to cover all the possibilities that the court in Saskatchewan would have to examine in our hypothetical case.

The rule that states that the Alberta regime is not to apply to couples who did not have their last common habitual residence in Alberta might be taken as an indication, by the Saskatchewan court, that the Alberta court would, in this case, apply the law of the new common habitual residence. This would lead to the Saskatchewan court accepting the renvoi from Alberta and applying the law of the new common habitual residence - Saskatchewan. This would not be a satisfactory result either. The property was acquired while the couple were living in Alberta under deferred sharing and their property relations are thought to have a stronger connection with the deferred sharing system of Alberta than with any other law. The fact that the property remains in Alberta only reinforces this point.

The actual result in the hypothetical case outlined might not be too unjust because Saskatchewan's system of separation of property has been mitigated by judicial discretion to divide property on the dissolution of marriage. The same cannot said for cases involving the laws of provinces that apply separation of property in its original

form.

In summary we can repeat that the application rule of the Alberta regime is inadequate because, in aiming at total mutability when there exists great disparity between the provincial laws of the rest of Canada on matrimonial property and the scheme proposed for Alberta, it will cause injustice. We have indicated ways that the courts might temper the injustice caused by this rule of total mutability but our conclusion is that the common law conflicts rules are really inadequate to meet the challenge.

So far we have been concerned to examine how the courts of other jurisdictions might deal with cases that have elements taking place in Alberta after the new regime comes into force. It is our purpose now to examine how the Alberta courts will deal with a case that has relevant elements taking place in Alberta.

IV. Deferred Sharing and the Choice of Law : Alberta Courts

We will next consider that case where a couple come before an Alberta court for the purpose of dissolution of their marriage, yet where the application rules of the Alberta regime seem to preclude application of the Alberta regime to the propietary relations of the couple.

The case we have in mind invloves a couple who come to Alberta for the purpose of dissolution of their marriage but where the Alberta regime seems to preclude application of itself because the couple do not have their last common habitual residence in Alberta. In this discussion we shall seek to determine which system of law should govern their propietary relations in that event.

Our discussion revolves around the main application rule of the Institute's Report, contained in Section 2 of the Draft Bill. That rule, of course, applies the Alberta regime to those couples who have their last common habitual residence in Alberta:

> This act applies to:
>
> (I) a married couple
>
> (i) each of whom at the time of their marriage is resident in Alberta, and
>
> (ii) who have not yet established a common habitual residence.
>
> (2) a married couple whose common habitual residence is in Alberta; and
>
> (3) a married couple whose last common habitual residence was in Alberta

We shall have to determine if this rule excludes application of the Alberta regime to all those who do not have their last common habitual residence in Alberta.

In the case of couples who do not have their last common habitual residence in Alberta the first question that must be answered relates to the choice of law rule that the Alberta court will apply to their matrimonial property relations. More specifically, does the fact that the Alberta regime is only to apply to couples who have their last common habitual residence in Alberta mean that a new connecting factor is to be used by the Alberta courts when considering the marital property rights of couples? Are problems of private international law involving matrimonial property rights henceforth to be solved using the connecting factor of last common habitual residence? It will be recalled that we earlier identified the traditional connecting factor used in conflicts problems as that of matrimonial domicile.

It will also be recalled that we were unable, in our discussion of the traditional choice of law rules for matrimonial conflicts, to ascertain if Alberta courts would employ a rule of immutability or **mutability** If it could be established that a new connecting factor - that of last common habitual residence - was to be used henceforth in matrimonial property conflicts, the same choice would have to be made.[18] The court would have to decide if the law of the last common habitual residence was to govern all the propietary relations of the couple, or if that law was to govern only property acquired while habitually resident in that jurisdiction. The former approach could be identified as one of total mutability because the marital property rights of the couple change with each last common habitual residence. The latter approach is that of limited mutability as the law of each last common habitual residence would govern the property acquired while a couple had their habitual residence there.

We are not in favour of an approach of total mutability. It would be inequitable if spouses' rights were to change with each change of common habitual residence. The arguments against total mutability, whether based on a connecting factor of matrimonial domicile or last common habitual residence, are believed to be convincing and have been canvassed already in this thesis. In our concluding chapter we will advocate a choice of law rule based on the notion of limited mutability. We believe limited mutability to be the better approach.

In any case, our primary concern here is to ascertain if a new connecting factor - that of last common habitual residence - can be inferred from the terms of the Draft Bill, not to speculate whether the

Alberta court would use that connecting factor to base a choice of law rule using mutability or immutability.

The arguments in favour of adopting a new connecting factor of last common habitual residence are not inconsequential. One can point to the artificiality of the concept of domicile as it is traditionaly understood in the conflict of laws. One could also point out that habitual residence is being used extensively in international conventions on the conflict of laws. We will argue strongly in a future section of this thesis that last common habitual residence must be a valid point of contact for certain choice of law purposes. If it is valid there, why should it not be valid here also? It may also be presumed that the drafters of the proposals do not intend to add a new connecting factor to the ones that already vie for position as the favoured one in matrimonial property conflicts - i.e. last matrimonial domicile and matrimonial domicile at the time of marriage.

In our concluding chapter the limited mutability approach that is seen as a possible way out of the conflicts problems we have exposed, is based on the concept of habitual residence. However, if the courts are left to fathom their own way out of these conflicts problems then it is submitted that an approach using the connecting factor of habitual residence is to be preferred.

The arguments against inferring a new connecting factor from the application rule of the Alberta regime are also strong however. Perhaps the most compelling of them is that it would be strange if such a major change in the jurisprudence of this province was only to be arrived at by implication. If last common habitual residence was to become the new

connecting factor in choices of law in matrimonial property conflicts one would imagine that this would be stated clearly in the legislation. On the other hand, the history of private international law has been full of instances of judicial adaptation and fashioning of new rules to meet situations that were unforseen by law reformers.

The strongest argument in favour of last common habitual residence being the new connecting factor for matrimonial property conflicts is the fact that it would be strange if the court was enjoined to use it as the connecting factor when the regime applied to couples, and another connecting factor when the regime did not apply. In other words, the law of Alberta is to be applied when Alberta is the last common habitual residence of a couple, so why should the law of another province not be applied when it is the last common habitual residence of a couple?

Accepting therefore that there may be a case for inferring a new connecting factor from the terms of the application rule of the Alberta regime, we shall go on to the main part of our discussion of the first specific situation that we outlined at the beginning of this dicussion. If the adoption of either a new choice of law rule based on last common habitual residence of a couple, or the use of a traditional choice of law rule based on matrimonial domicile, leads the court to consider that the 'law of Alberta' is applicable, what will the court hold the law of Alberta to be.

We should perhaps indicate the various routes that the court might take to reach the conclusion that the 'law of Alberta' was applicable. If the traditional connecting factor of matrimonial domicile is used by the court, the court must then choose mutability or immutability.

If Alberta was the matrimonial domicile of the couple at the time of their marriage and the court used immutability then the 'law of Alberta' will govern the couple's marital property. If Alberta was the place of the couple's matrimonial domicile at some time in the marriage, and the court was using a theory of limited mutability, Alberta law would govern that portion of the couple's property acquired while the couple were domiciled in Alberta. Suppose that the court employed the connecting factor of common habitual residence and limited mutability and that Alberta was the common habitual residence of the couple at some time during their marriage. In that case the court would again be seeking to apply the 'law of Alberta'. We are not, of course, considering the case where a couple have their last common habitual residence in Alberta. In that case it is clear that the deferred sharing regime will apply to the couple unless they are already subject to deferred sharing.

Assuming therefore, that the court is to apply the 'law of Alberta' to at least some portion of the couple's goods and gear, what system of marital property will the court in Alberta apply? Can the court apply the deferred sharing regime of Alberta even though the couple do not have their last common habitual residence in Alberta? Would the court, on the other hand, apply separation of property to the couple because the rule of application is read as excluding application of the deferred sharing regime to all those who do not have their last common habitual residence in Alberta?

What the problem really comes down to is whether two domestic systems continue to exist in Alberta after the enactment of deferred sharing. Is one applied to couples who have their last common habitual

residence in Alberta, and is the other applied to couples who do not have their last common habitual residence in this province, yet whose property relations should be governed by the law of Alberta according to the common law conflicts rules on matrimonial property?

Resolution of this dilemma depends on an interpretation of section 2 of the Draft Bill. If section 2 can be regarded as excluding application of the deferred sharing regime to all those who do not have their last common habitual residence in Alberta, separation of property must continue to govern the property relations of those who fall outwith the scope of section 2, and whose propietary rights are to be governed by 'the law of Alberta'.

On the other hand, if one can regard deferred sharing as the only domestic system in Alberta after the enactment of deferred sharing, this carries with it the implication that the application rule in section 2 is not exclusive; in other words, application of deferred sharing can occur when a couple do not have their last common habitual residence in Alberta.

What can be said in favour of a non-exclusive interpretation of section 2; i.e. one where the fact that a couple do not have their last common habitual residence does not exclude application of the Alberta regime as the 'law of Alberta'?

Firstly, and primarily, adoption of any approach other than a non-exclusive one will cause injustice in certain cases, cases that are not thought to be unusual. An illustration will be useful. Suppose a couple marry while resident in Alberta and live in this province together for most of their married life - some thirty years. They might then move to Saskatchewan and make their home there. After one year of

residence in that province they would normally be considered to be habitually resident there. The couple might then part and one of them might return to Alberta and, having satisfied the jurisdictional requirements of the Divorce Act, raise an action of divorce. In such a case it is submitted that the law of Alberta should govern the property rights of the couple, at least in so far as property acquired while habitually resident in Alberta is concerned. It is also submitted that the law of Alberta must be interpreted to be the deferred sharing regime.

One must assume that the couple expect their property rights to be governed by deferred sharing. It will be the unusual case where a couple change their common habitual residence in order to fall outwith the application rules of the report. To apply separation of property to a couple who have lived for thirty years under deferred sharing, and for that application to be by the forum of the jurisdiction where the couple had lived for so long under deferred sharing, would not be a satisfying result. Yet such would be the result if the court found that the law of Alberta was to govern the disposition of at least some of the property of the couple, and if the application rules of the regime were interpreted exclusively.

Taking the case of a couple who may have been habitually resident in Alberta for a short time during their married lives, it is not so imperative that Alberta law be applied to them. The policy considerations that would make application of deferred sharing just, obviously vary according to the type of connection a couple might have had with this province. A strict test of habitual residence basing a connecting factor of habitual residence, a limited mutability rule and a non-exclusive interpretation of section 2 might be thought to be the most equitable

solution that the court could find to the problem. If a period of residence in Alberta is so short that application of the Alberta regime to property acquired while resident here would not be justified, a strict test of habitual residence may obviate any difficulty, by preventing regard being taken of Alberta law at all. Other factors that we will explore in our conclusion, such as the tracing doctrine, will render application of the law under which a couple lived for only a short time, irrelevant.

What are the considerations that might be thought to prevent the courts from giving a non-exclusive interpretation to section 2? Such a construction might be thought to violate the rules of statutory interpretation, among them the rule that propietary rights are not to be interfered with except on a strict interpretation of a statute. In so far as the deferred sharing regime changes the law whereby a spouse got nothing by virtue of the fact of marriage, its application by implication may be thought to go against this canon of construction.[20] This interpretation may also go against the maxim expressio unius, exclusio alterius. By enumerating the situations where the deferred sharing regime is to apply, perhaps the Bill intends that it should only apply where a couple have their last common habitual residence in Alberta.

It may also be thought strange that such a major area of concern should be resolved by mere implication. Conversley, it may be thought strange to intend that Alberta should have two domestic systems after the enactment of deferred sharing,[21] especially when the alternative system is the one that has been shown to be inequitable and archaic.

As things stand in the report, the application rules for the Alberta regime are inadequate. A more comprehensive conflicts of law rule

is needed if the regime is to be incorporated successfully into the law of Alberta. If the courts are forced to deal with the case of the person whose property relations manifestly should be governed by the law of Alberta, and that in the shape of deferred sharing, on the basis of the rules as they stand at present, we would recommend that the court adopt a limited mutability rule based on a connecting factor of last common habitual residence. We would also recommend a non-exclusive interpretation of section 2 and a strict definition of common habitual residence.

V Some Practical Problems Explored.

We will discuss next some of the practical problems that may arise should Alberta's deferred sharing regime be injected as a factor into Canada's matrimonial conflicts laws, as they now stand.

Taking first the case involving Quebec, we at once find a problem caused by the dichotomy between the conflicts rules of that province as they relate to the matrimonial regime of Quebec, and the application rules of the Alberta regime. A couple might be domiciled in Quebec and resident in Alberta and marry in Alberta under deferred sharing - i.e. without any express stipulation as to their marital property rights. We may assume that the couple are not habitually resident in any province. In this situation the Alberta Institute's Report would seem to indicate that if the couple came before the Alberta court for divorce, the Alberta court would apply the deferred sharing regime of this province.[22] Under the conflicts rules of Quebec, a Quebec divorce court would apply the partnership des acquets of the province of Quebec.[23] This cannot be a tolerable situation, for, if one of the spouses indulged in what is commonly referred to as forum-

shopping a spouse could choose to come before the court that will apply the regime best suited to his or her interests.

Lest the problem posed here, and the other problems involving the legal regime of Quebec, be dismissed as involving false conflicts (i.e the choice of law 'problem' is regarded as illusory, there being no significant difference between the two laws one is choosing between) it should be appreciated that real differences do exist between the deferred sharing regime of Alberta and the partnership des acquets of Quebec. For instance, under the Alberta regime, a donee from a spouse who has received a gift or transfer within three years of the other spouse commencing proceedings to have that gift set aside, is presumed to have acted in bad faith and can be ordered to pay the aggrieved spouse the amount he or she lost by reason of the transfer. Under the Quebec regime, on the other hand, no such presumption exists and, indeed, if a spouse is in sole control of a moveable, and if he or she represents himself or herself as having the power to enter into transactions concerning that moveable, alone, that spouse is deemed to have that power when dealing with third parties acting in good faith.[24] There are other differences, including that relating to the provisions on classification of property received by one spouse as compensation for personal injury. Under the Quebec Civil Code such property is the private property of the injured spouse.[25] Under the Alberta regime, damages may be shareable in so far as they represent "compensation for economic loss suffered by the married couple during the statutory regime." The point is that there are believed to be sufficient differences between the two regimes to justify inquiry as to which regime rules as to the couples' matrimonial property rights.

Take again the case of a couple who marry in Alberta while resident here and while domiciled in Quebec. It is a fact that Quebec domiciliaries can choose a conventional regime (i.e. one that is entered into by express contract, such as a regime of separation of property) quite simply and before their marriage by "notarial deed en minute"[26]. Such an agreement would not require the approval of the court, nor would there have to be all the acknowledgements required by the Alberta regime to prevent over-reaching.[27] What would be the status of an agreement entered into by a couple resident in Alberta, while in Alberta, that was in the form of the typical Quebec marriage contract? Would it be invalid as not complying with the formalities required by the Alberta regime? A Quebec court would hold the agreement valid,[28] but an Alberta court would not.[29] This is a result of the Quebec court assuming that Quebec law applied to the couple's matrimonial property rights because the couple were domiciled in Quebec at the time of their marriage, and the Alberta court assuming that Alberta law is applicable because the couple are resident in Alberta at the time of their marriage and have no habitual residence elsewhere. This assumption by the Alberta court would probably prevent it holding that the contract was valid by its proper law - the law of Quebec. The result would be that the Alberta court would hold the couple's matrimonial property rights governed by the deferred sharing regime, while the Quebec court would apply the terms of the agreement.

One last example involving Quebec elements will be canvassed. This case involves a couple who marry while domiciled and resident in Alberta after the passing of the legislation which introduces deferred sharing. Sometime after their marriage in Alberta the couple might acquire a domicile

in the province of Quebec and petition for divorce in that province. It would probably be the case that the Quebec court would not apply the Quebec regime as Quebec was not the matrimonial domicile at the time of the marriage.[30] To obviate any complications caused by possible application of the intended matrimonial home doctrine we may also assume that the couple did not intend to move to Quebec at the time of their marriage, and, in fact, stayed in Alberta for a considerable time after their marriage. The Quebec court would apply the law of Alberta as Alberta was the matrimonial domicile of the couple. We have already shown that the conflicts rule of Quebec involves immutability - the law of the matrimonial domicile rules as to the propietary relations of a married couple and changes of domicile have no effect on this choice of law rule.

We can set out three possible approaches that the court in Quebec might take when asked to determine the marital property rights of the couple. Firstly, the Quebec court might hold that as no vested rights accrued to the spouses under the Alberta regime, separation of property applied between them. This would not be a wholly unexpected result as couples are separate as to property until the time comes to terminate the regime. The Quebec court might then go on to apply the maintenance provisions of the Divorce Act. This would leave the couple open to apply to the Alberta court, perhaps, for a sharing of the marital property. This would depend upon the Alberta court being able to hold that the couple were still habitually resident in Alberta. This would, of course, invlove extra expense and result in the rights of ownership, upon which the maintenance order was based, being substantially altered.

A second possibility is that the Quebec court might characterise the Alberta regime as applying between couples due to their tacit consent

(by analogy with the regime familiar to the court). The court might then go on to apply the provisions of the Alberta regime and share the acquisitions of the couple since the date of their marriage. This would, it is true, result in an equitable disposition of the case, but it would be based on a fiction. Characterisation of a foreign matrimonial property regime, as applying between couples due to their tacit consent, should have no bearing on the choice of law process. Also such a characterisation should only proceed on evidence of the foreign law from those learned in that law.[31] As the whole idea of the tacit contract is alien to the domestic jurisprudence of Alberta, it is unlikely that a member of the Alberta bar would testify that the deferred sharing regime applied between couples due to their tacit consent.

A third possibility is that the Quebec court would revise its own conception of 'rights' and effect the partition of the spouses' property in the same way as an Alberta Court would have done. Spouses marrying under the Alberta regime, marry under a regime that gives spouses much the same right to share in each other's acquisitions as the legal regime of Quebec. The Alberta regime does it by giving spouses the right to apply to a judge, on various specified occasions, to order a sharing. The Quebec regime does it through the medium of a tacit contract between the spouses. To refuse to apply the law of either jurisdiction might attract the criticism that an inadequate characterisation of spouses' rights had been indulged in for the sake of mechanical adherence to a conflict of law rule (immutability) that can be criticised on a number of grounds. (One could, of course, answer possible criticism that immutability would be the result here if Quebec applied the Alberta regime, by saying that it is the legislative policy of both jurisdictions that post-nuptual gains be shared.

Whether one achieves that end by revision of the Quebec rule of immutability or by revision of the Quebec conception of 'rights', might not be too important). To refuse to apply either law of matrimonial property would be to apply an archaic conception of the Alberta system of marital property, i.e. separation of property, and to accord immigrant spouses less justice than their Quebecois neighbours.[32]

The third possibility is identified as the most attractive. It avoids fiction and injustice and displays appreciation of the virtues of functional characterisation.

Turning now to the 'common law' provinces, what would be some of the practical results of the introduction of the proposed deferred sharing regime in Alberta on the conflicts of laws that might arise if relevant foreign elements in a case took place in a foreign 'common law' province?

A couple might marry while both parties were resident in Alberta and so become subject to deferred sharing. Assume that the husband deserts his wife and goes to Saskatchewan where he establishes the necessary actual and ordinary residence to found jurisdiction in an action of divorce in that province. Assume also that the spouses were only habitually resident in Alberta together. Alberta was the last common habitual residence of the couple. If a decree of divorce was granted to the husband there would probably be a dispute between the spouses as to the ownership of their property. The husband or the wife could apply to a judge of the Saskatchewan Queen's Bench for a discretionary sharing of any of the property of either spouse.[33] The discretion a judge has under the Saskatchewan Act is a very wide one, and one may surmise that the disposition that a Saskatchewan judge might

make under the Saskatchewan Act could be a very different one from that which an Alberta judge might order under the deferred sharing regime of this province. A judge under the Saskatchewan Act for instance, need only take into account a 'written agreement' between the spouses regarding ownership of their property.[34] He may deal with any property of either spouse, not only that acquired since marriage. The Saskatchewan Act has no applicability rule to limit its application to spouses resident in Saskatchewan.

In the example suggested, one spouse could obtain an order of the Saskatchewan court dividing the spouses' property, while the other spouse could be petitioning the Alberta court for a termination of the deferred sharing regime. The result could be a confusion of property, termination and maintenance orders that would be expensive and time-consuming to sort out. While confusion may result from the fact that the Saskatchewan regime has no applicability rule to limit its application to spouses resident in Saskatchewas it may be true that this is primarily a jurisdictional problem and that the Saskatchewan court will have regard to the principles of private international law when making an order relating to the disposition of the spouses' assets.

With reference to those provinces that apply the old common law idea of separation of property between spouses, we are faced with the same sort of problem as confronted us when we discussed the case of the couple who marry in Alberta while resident here and who then acquire a domicile in Quebec and divorce there. However, the problem when the second domicile is a common law jurisdiction is exacerbated, for it is less certain that the court of that common law jurisdiction will recognise any

matrimonial property rights of the couple, the concept being one alien to the common law court.

If the 'common law' forum divorced the spouses and employed its own matrimonial property law as between the spouses (i.e. separation) and then made a maintenance order, one might have the need for a revision of that order should the spouses still be held habitually resident in Alberta and raise an action for termination of the regime here. The divorcing court would not employ the traditional rule of limited mutability to effect a just division of property, for rights under the Alberta regime are not 'vested' as that term is understood in the common law. It is also unlikely that the idea of a contrat tacite would be used to effect application of the Alberta regime, that concept being similarly alien to the common law. The rejection of the tacit contract theory and immutability would also preclude the application of the Alberta regime by use of an enlightened conception of what 'rights' are - the solution proposed where a Quebec court was involved.

Once again we are faced with a case where spouses' property rights will vary substantially depending on where their marriage is dissolved. The fact that only one party need be actually and ordinarilly resident in the jurisdiction of the court granting the divorce makes it likely that the spouses might be subject to two different matrimonial property laws at the crucial time - the time when the marriage is brought to an end.

Even if both spouses are actually and ordinarily resident in the granting jurisdiction, that need not preclude residence simpliciter or habitual residence in Alberta. Would a disposition of spouses' property according to judicial discretion be res judicata to an action of termin-

ation in Alberta?

So far we have dealt with the case of a marriage being terminated inter vivos and we have seen how serious conflicts issues can arise in relation to spouses' property rights when this occurs. The problems on termination of a marriage mortis causa are believed to be no less serious.

The problem lies in the fact that the Alberta regime will apply to couples who are resident in Alberta at the time of their marriage and who have no common habitual residence, and to couples whose last common habitual residence was in Alberta. The Institute's proposals envisage the Alberta regime applying on the death of a spouse, yet only in favour of the surviving spouse. We have already seen that a person may be domiciled in one province yet be resident or habitually resident in another. On the death of a person who had a last common habitual residence in Alberta with his or her spouse, the distribution of that person's estate would be primarily in accordance with the provisions of the Alberta regime. Yet, what if that person was also domiciled in another province at the time of his or her death? The universally acknowledged rule of private international law dealing with succession refers succession, to moveables at least, to the domicile of the deceased at the time of death.

Would both Alberta law and the lex domicilii at death seek to regulate the succession to the estate of a deceased person in the case outlined above? We have already discussed critically the decision in Beaudoin v. Trudel[35] and it is believed that with the hypothetical outlined here, there is even less reason to indulge in an epithetical characterisation - one that would refer the 'matrimonial property rights' of the widow to Alberta law as it was the last common habitual residence

of the spouses, and one that would refer the successorial rights of the widow (such as the right to succeed to however much of the deceased's estate remained after partition of the acquests) to the law of the domicile of the deceased at the time of his death. Under the Alberta regime the surviving spouse has no 'present' or 'vested' rights to any of the other spouse's property until the time of his death and the time of the regime's termination. The right to a share of the property acquired since the time of the marriage under the Alberta regime is technically closer to a right to succeed under an intestate succession act than was the right of the surviving husband in Beaudoin v. Trudel to half of the matrimonial property. It would be strange therefore, if a spouse was able to claim half of all of the spouses' assets under the Alberta regime and a substantial share of the deceased's estate under the intstate succession provisions of another province which was the domicile of the deceased at the time of his death.

In those cases where the last common habitual residence of the deceased does not coincide with his domicile at death, it will be easy for the legislative intention of both laws to be frustrated by a cumulative application of them. It may be that a widow is allowed succession and marital property rights under the law of Alberta, if that is the domicile of the deceased at death and the last common habitual residence of the spouses. The law of Alberta will be a system that regulates the property disposition of the spouses in that case. Its legislative intention will be manifest through the relative marital property and succession rules. Because domicile at death and last common habitual residence coincide in this case, the laws of succession and marital property will be allowed to work together to carry out the legislative intention of the system. This

will not happen when the domicile at death and the last common habitual residence do not coincide. Then the connecting factors of domicile at death and last common habitual residence will refer what should be a question for one legal system to two different, unrelated systems that take no account of each other's legislative intention.

Footnotes to Chapter Six

I. Louisiana, Washington, Texas, Idaho, Nevada, New Mexico, Arizona, California.

2. (I827) 5 Mart. (n.s.) 569 (Louisiana)

3. See Chapter 4. See also In Re Majot's Estate (I9I0) I99 N.Y. 29.

4. Devos v. Devos (I970) IO D.L.R. (3d) 603, [I970] 2 O.R. 323 (Ont. C.A.).

5. The only exception to this is the case of Re Heung Won Lee Estate (I962) 40 W.W.R. I52 (B.C. S.C.). There the community property system of Brazil was applied to property acquired while the parties were domiciled in Brazil. They had been married in the U.S.A. while the husband's domicile was Korea. The matrimonial domicile was therefore Korea. No inquiry seems to have been made as to whether the law of Brazil would have applied itself given the facts outlined. It seems that Brazilian law would only apply itself if Brazil could be held to be the first matrimonial domicile where the parties had different pre-marital domiciles. See Garland, American-Brazilian Private International Law (I959) at 29 et. seq.. There is no indication in the report of the case whether the wife's pre-marital domicile was that of Korea or not.

6. Perhaps a useful comparison can be drawn here with the dangers inherent in introducing the trust into French law and other Romanist systems. See Rene David, The International Unification of Private Law, (International Encyclopedia of Comparative Law, Vol. II, Ch. 5 at 3I (I970) : "What would be the result of introducing this idea into our[Romanist]system of law? If the trust were accepted in its English form this would mean that we had accepted the distinction between law and Equity - the resulting disturbances, with unforeseen implications, might be imagined."
Compare Watson, Legal Transplants (I974) at 27: "A successful legal transplant - like that of a human organ - will grow in its new body just as the rule or institution would have continued to develop in the parent system. Subsequent development in the host system should not be confused with rejection."

7. Kuhn, Comparative Commentaries on Private International Law (I937)

8. ibid. at I52.

9. op. cit.

IO. (I898) 40 N.S.R. 260

II. ibid., at 262 per Meagher J.

I2. See Cheshire op cit., at 480.

I3. Dicey op. cit.., Rule 79.

I4. op. cit.

I5. ibid., at 345.

I6. Dicey op. cit., at 6I.

I7. ibid.

I8. It will be appreciated that the concept of immutability as we understood it in chapter 4, will not be applicable where the connecting factor used is that of last common habitual residence. An approach where the law of the last common habitual residence is used to govern all the matrimonial property rights of the spouses is better termed one of total mutability.

I9. We are not considering the system that is to apply to couples already married when the legislation is passed, i.e. judicial discretion.

20. Strictly speaking the common law rule gave the husband the wife's moveables under the jus maritii and the power to administer her real property under the jus administrationis. This common law rule did apply in Alberta before the enactment of legislation similar to the English Married Women's Property Act I882, during Alberta's territorial period (I870 - I905). (see now Married Women's Property Act R.S.A. I970, c. 227). Strictly speaking therefore, separation of property comes not from the common law but from statute. This would mean that the maxim whereby common law property rights are only to be interfered with on a strict interpretation would only be applied in favour of the husband as he is the only party who would have his common law rights interfered with by application of deferred sharing. As this would be a totally unacceptable position to adopt, the rule of construction may not mean too much in this context.

2I. vide supra n. I9.

22. Alberta's Institute's Report op. cit., Recommendation #2 : "That a deferred sharing regime commence at the time of the marriage of a couple, each of whom is then resident in Alberta". (The example posed presumes, of course, that Alberta was the last common habitual residence of the couple).

23. It has already been established that Quebec applies its matrimonial property regime to Quebec domiciliaries.

24. Quebec Civil Code, Article I84.

25. ibid., Article I266 1.

26. Statutes of Quebec I969, Chapter 77 op. cit., Article I264.

27. Alberta's Institute's Report op. cit., Recommendation #28.

28. Because the agreement was valid by its proper law.

29. Because the couple were resident in Alberta at the time the agreement was made.

30. Vide Ante, Ch. 4.

31. See De Nicols v. Curlier op. cit., speech of Lord Chancellor Halsbury at page 24.

32. Compare Waters, Matrimonial Property Entitlements and the Quebec Conflicts of Laws. (1976) 22 McGill L.J. 315 at 319.

33. See An Act to amend the Married Women's Property Act. R.S.S. 1974-75, Ch. 29.

34. ibid., section I (2).

35. vide ante Chapter 3.

CHAPTER SEVEN

CONFLICTS PROBLEMS INVOLVING PROVINCES' PROPOSED REGIMES

I. Introduction

Having discussed some of the conflicts of laws problems that might arise should the Alberta regime be introduced onto the matrimonial property scene as it exists at the moment, it is now fitting that we discuss some of the conflicts problems that might arise should the other provinces change their matrimonial property laws in accordance with the various reports many of them have issued.

The preliminary point should be made however, before such a study is embarked upon, that few of the provincial proposals regarding reform of matrimonial property are very specific as to the applicability of their various regimes. The criticism might be made that this problem was identified even in relation to the Alberta regime. However it was shown that, given the applicability rules for the Alberta regime as they now stand, serious conflicts of laws problems will arise. Therefore, while the other provincial proposals may not have reached the degree of finality that the Alberta proposals have, it is submitted that there is enough in the provincial reports to indicate two things: Firstly, the basic rules of application, in so far as they can be ascertained, will give rise to conflicts of laws problems. Secondly, the lack of awareness of possible conflicts problems in the reports probably portends no great legislative efforts to forestall them when the proposals come before the various provincial legislatures. The comment was made in the previous chapters that the Alberta regime attracts criticism because, for instance, the rule reg-

arding application of the of the regime was inadequate. Some of the provincial reports do not have any applicability rule, even where the other proposals are sophisticated and concrete enough to be translated directly into draft legislation.

It is the intention here to discuss the working of various of the Alberta proposals with the proposals for the provinces of Ontario and Manitoba. It will be appreciated that in so far as the other provinces propose reform of their matrimonial property laws parallel to those of Ontario, the comments made with regard to the working of the Alberta regime with the Ontario regime will apply to them. Saskatchewan is at present mid-way through reform of its matrimonial property laws. Judicial discretion was introduced as an interim measure in 1974 and definite proposals now exist to amend the law on the matrimonial home. The enactment of a deferred sharing regime will be the last item of the package, but the proposals on this are so tentative as to exclude any separate, detailed consideration of the rules of application of the proposed regime, or any other aspects of it that might be considered a source of conflicts of laws problems.

II. Alberta and Ontario

A "Bill to reform the law respecting the property rights and support obligations between married persons and in other family relationships"[1] had its first reading in the Ontario Legislature on the 31st of March 1977. Although the main thrust of the Bill is the same as the proposals contained in the Ontario Law Reform Commission's Report on Family law,[2] the rules regarding choice of law and application of the proposed deferred sharing regime differ considerably. It is these latest indications of the Ontario regime's application that will be considered here.

The Ontario Bill (Bill 6) states...

> (I) The division of family assets and the ownership as between spouses of movable property wherever situate are governed by the internal law of the place where both spouses had their last common habitual residence or, where there is no place where the spouses had a common habitual residence, by the law of Ontario.
>
> (2) The ownership of immovable property as between spouses is governed by the place where the land is situated, but where the law of Ontario is applicable respecting the division of family assets, the value of the property may be taken into consideration.....

The rule set out above may be considered as going a long way to solving the problem already outlined, of the couple who were habitually resident in Alberta and subject to deferred sharing, yet who are divorced by a court in Ontario because one of them, or both of them, satisfy the jurisdictional requirements of the Divorce Act. Under the Ontario rule an Ontario court would apply Alberta law as regards the matrimonial property rights of the parties, if the parties were divorced in Ontario. The rule in the Ontario Bill does not solve all of the problems however. Assume that spouses were resident <u>simpliciter</u> in Alberta at the time of the marriage, and therefore became subject to deferred sharing under the Alberta regime, and immediately thereafter enjoyed a nomadic existence together? Assume that the spouses could be said never to have had a common habitual residence. The fact that parties are able to satisfy the jurisdictional requirments of the Divorce Act is no guarantee of common habitual residence, of course, for actual and ordinary residence of only the petitioner or the respondent is required.

If the set of facts outlined arose, the Ontario court would apply its matrimonial property laws if it was the divorcing forum, and the Alberta court would apply the deferred sharing regime of Alberta if Alberta

was the divorcing jurisdiction. The matrimonial property rights of the parties would depend upon the forum of their divorce.

The Ontario rule does not take account of the possibility of couples having more than one common habitual residence in two different province at the same time. This is a possibility which, it is submitted, does exist. Neither the Alberta nor the Ontario proposals have a rule to deal with this possibility. If this situation arose, perhaps neither court would know which matrimonial property regime to apply. Perhaps each court would apply its own.

When one introduces foreign elements taking place in Quebec into one's Alberta-Ontario examples, the problems become more complicated and consequently more difficult. To lead gently into the maze, as it were, take first the case of a couple who had their matrimonial domicile in Alberta, yet who had a common habitual residence in Quebec sometime before one of them petitioned for divorce in Ontario. Assume that the couple do not acquire a common habitual residence in Ontario. When the Ontario court applied the 'internal law' of Quebec, would the Ontario court be applying the matrimonial property regime of Quebec that Quebec applied when no relevant foreign elements were present, or would the Ontario court take account of the Quebec conflicts rule which precludes application of the partnership des acquets to everyone that does not have their matrimonial domicile Quebec? It would seem that the reference to 'internal law' would preclude the Ontario court from taking account of the Quebec conflicts rule. 'Internal law' is usually taken to mean that law which a jurisdiction would apply where there are no relevant foreign elements present.[5] The result of this, it is submitted, is that the Ontario court would apply that law which Quebec would not - partnership des acquets.

We have already seen how differences between the laws of Alberta and Quebec on marriage contracts will give rise to conflicts of laws problems. Turning now to the Ontario regime, we find that if a couple make an express marriage contract, that contract will govern their propietary relations in preference to the deferred sharing regime.

> Where a domestic contract makes provision in respect of a matter that is provided for in this Act, the contract prevails except as otherwise provided in this Act.[6]

This provision is really carrying on the common law rule regarding marriage contracts. Where the provisions of Bill 6 depart from the common law is in section 57:

> The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,
>
> (a) a contract for which the proper law is that of a jurisdiction other than Ontario, is also valid and enforceable if entered into in accordance with the internal law of Ontario.[7]

Therefore, if a couple resident in Alberta at the time of their marriage make a marriage contract in Alberta purporting to contract out of the Alberta regime, yet which does not comply with the formalities prescribed by the Alberta proposals, that contract will be unenforceable in an Alberta court. This will be the case because of the rule of the Alberta regime contained in section 6 of the Draft Bill.[8] However, if the contract complies[9] with the less strict formalities of the Ontario Bill it will be held valid and enforceable in an Ontario court, notwithstanding its invalidity by Alberta law.

The common law rule respecting the formal validity of marriage contracts will hold a marriage contract valid if the law of the place

of contracting holds the contract formally valid or if the proper law of
the contract would hold the contract valid as to formalities.[10] It is also
true that if a matter is classified as procedural it will be valid if it
is valid by the law of the forum. English and Canadian courts tend to give
a wide meaning to the term 'procedural' and classify as 'procedural',
matters that might be thought better assumed under the head of formal
validity.[11] The distinction between matters of form and matters of procedure
is not easily made. Matters of procedure are said to be rules which are
primarily aimed at supplying information to the court. A rule of evidence
therefore, which held that all documents had to be in writing, could be
classified as one of procedure and governed by the lex fori. On the
other hand, if a rule relates instead to the manner of making a contract
it may be classified as a matter of form. Rules designed to ensure parties
are aware of the implications of an obligation entered into will be more
accurately described as matters of form.

Looking at the rules of the Alberta regime on contracting out of
deferred sharing,[12] it is submitted that the only part of the rules contain-
ed in Recommendation #28 that are primarily aimed at presenting infor-
mation to the court, are the requirements that an agreement to contract
out of deferred sharing should be in writing. The other requirements are
primarily aimed at ensuring each party understands the nature of the
agreement that is being entered into. They are provisions designed to
prevent overreaching.[13] This characterisation of the rules of the Alberta
regime should be borne in mind as our discussion of cases involving
marriage contracts progresses.

Take again the case of a couple who married in the province of

Quebec and who had their matrimonial domicile there. Suppose that they
I4
contracted for a conventional regime by the normal method, and that they moved to Alberta sometime later and that they established a common habitual residence in this province. In this case both Ontario and Alberta would recognise the Quebec contract - Ontario because the contract is valid by its proper law, and Alberta because the couple were not resident
I5
in Alberta at the time the contract was made. In the case where the Quebec domiciliaries were resident in Alberta at the time of their marriage however, the Alberta court would hold the agreement invalid, while the Ontario court would hold it valid and enforceable.

Our last example will concern a couple who marry while resident in Alberta and whose matrimonial domicile is in Ontario. This is not an impossible situation : a man domiciled in Ontario might live and work in Alberta for a few months. In Alberta he might meet a woman and they might resolve to marry. The marriage could take place in Alberta and the couple might intend to return to the East as soon as the period of employment is over for the man. If that couple made a marriage contract in Alberta - a bare contract, signed and attested - that contract might well be held valid and enforceable in Ontario while it seems that an Alberta court would hold it invalid if all the acknowledgements and consents required by Recommendation #28 had not been complied with. This is the effect of Recommendation #29 - it subjects to the rules of the Alberta system, all contracts made by people who are resident in Alberta at the time of contracting and who intend to marry each other. Whether the contract was held valid and enforceable in Ontario would depend upon whether Ontario law could be held to be the proper law of the contract. In the example

outlined, it almost certainly would.[16]

III. Alberta and Manitoba

The proposals of the Manitoba Law Reform Commission will now be examined to see how they interact with those of the Alberta Institute.[17] The Manitoba proposals are not yet at the stage of draft legislation, so the comments made here may be regarded as more speculative than those made when the Ontario regime was being examined. Being more speculative, our comments here will also be briefer.

It is only as an aside, so to speak, that one finds out from the Manitoba report that the 'Standard Matrimonial Regime' (S.M.R.) is only to apply to couples resident in Manitoba at the time of their marriage after the proposals are enacted. Even where the information is let slip, two different expressions are used :

> If the S.M.R. were enacted as a feature of Manitoba family law it would be of little concern, if any, to married couples whose ordinary residence is outside the province unless and until they were to settle in Manitoba. Then such couples would be subject to the law of this province. We think it only fair that married couples taking up residence in Manitoba should enjoy the same rights (and bear the same responsibilities) as married couples who would have been already resident here upon the enactment of the standard matrimonial regime.[18]

In so far as the expressions 'ordinarily resident' and 'resident' have different meanings, the application rules of the Manitoba regime might be thought to be the source of some confusion. What of the case where a couple could be said to be resident in Alberta and Manitoba at the time of their marriage?

The Manitoba report goes on to recommend that couples already

married who establish their 'ordinary, habitual residence' in Manitoba should be subject to the S.M.R.(subject to certain provisions allowing for restriction of the S.M.R. according to a marriage contract, or restriction of the S.M.R. to property acquired after the establishing of 'ordinary, habitual residence' in Manitoba). Does 'ordinary, habitual residence' differ from 'habitual residence' simpliciter? Does the word [19] 'ordinary' add anything? Would an Alberta court apply the deferred sharing regime of Alberta to couples who could be said to have had their last common habitual residence in Alberta and their ordinary, habitual residence in Manitoba? In such a case would the Manitoba court apply the Manitoba regime if couples came before it for divorce?

There are possibly three areas that might cause problems when the Alberta system and the Manitoba system interact. Firstly, the hinge-pins of applicability, i.e. 'residence', for couples already married, may not be exclusive. A couple may be held resident in more than one province at the same time. Secondly, in so far as the hinge-pins of applicability for couples already married outside the respective provinces differ in their [20] meaning, i.e. 'last common habitual residence' and (common) 'ordinary habitual residence', that may lead to a conflict of applicable matrimonial property laws. Thirdly, the various terms being nowhere defined in either report, the courts of Alberta and Manitoba might adopt different tests of 'residence', 'common habitual residence', 'ordinary, habitual residence' etc.. This would also cause conflicts of laws as regards the applicable regime.

We also find that the Manitoba provisions for contracting out of, or restricting the effect of, the S.M.R., differ from the contracting-out

provisions of the Alberta proposals. The main difference under the Manitoba proposals is that a copy of the agreement to contract out of the S.M.R. would have to be filed in a public registry of marriage contracts.[21] There is no need for the acknowledgements of comprehension as to the effect of the agreement or for court approval, although the parties would have to have independent legal advice.[22]

The proposals as regards contracting out of the two systems differ sufficiently, it is submitted, that a conflicts of laws problem might arise. Suppose that a man domiciled in Manitoba marries a woman whose ante-nuptual domicile is Alberta, while both parties are resident in Alberta. They might conclude a marriage contract in Alberta in accordance with the Alberta provisions. Such a contract would be valid and enforceable before an Alberta court and before a Manitoba court. It would be valid before a court in Manitoba because the contract is valid by its lex loci contractus, the law of Alberta. But if one takes the same sort of situation and postulates that the couple might attempt to make a contract in Alberta that was valid by the matrimonial domicile, Manitoba, but which was not valid by the law of Alberta as not complying with Recommendation #28, we find a conflict of result depending on which court the agreement comes before. Manitoba courts would hold the agreement valid and enforceable because it was valid by its proper law - the law of Manitoba, which would be the matrimonial domicile of the couple. Alberta courts would hold the agreement invalid, applying the provisions of Recommendation #29.

IV. Some Conclusions.

While some of the problems that may be caused by interaction of the Alberta regime with the regimes proposed for Manitoba and Ontario will

result in serious inconvenience and confusion, it is recognised that the basic thrust of all three regimes is the same. All introduce some form of deferred sharing. Reference is made here to what was said earlier when the policy reasons against mutability in the choice of law rule for matrimonial regimes was being discussed. There it was said that if each country's matrimonial property laws were uniformly just, rights once held under one law could safely be lost and replaced by rights under another law. It will be appreciated that the proposals for Alberta, Manitoba and Ontario all tend to lean in the direction of mutability.

We have seen how the application rules relating to each proposed regime seek to apply the regimes to all post-nuptual acquisitions if the test of common habitual residence or residence or whatever is satisfied. The proposals relating to the Standard Matrimonial Regime of Manitoba allow restriction of the operation of the S.M.R. to certain classes of property but the conclusion is still valid that the rule regarding application of the S.M.R. leans in the direction of mtability. It will be clear also that the regimes proposed for Ontario and Alberta aim at mutability in that deferred sharing will apply to all post nuptual acquisitions without regard to the law of a previous jurisdiction under which the couple may have lived.

In any case, the point to be made here with regard to the working together of the three proposed regimes is that what was said earlier about the safety or justice of total mutability where all regimes are equally just, cannot be completely applicable here. This is true for a number of reasons. Firstly, the points pf contact proposed by the various reports may not be exclusive. Unlike domicile, of which a

person may only have one at any given time, residence and even common habitual residence, may be established in different places at the same time. Secondly, related to this is the possibility that the courts of the various provinces may not adopt the same tests as regards the hinge-pins of applicability. The test of domicile, while not easily defined, is at least assumed to be the same in each of the provinces. None of the reports define what they mean by residence, common habitual residence etc.. Thirdly, not all of the reports are uniformly just, whatever one's conception of that term is. They do not intend that each of the provinces will have the same matrimonial property regime, therefore they cannot be described as uniformly just. The Alberta regime, for instance, gives the judge a discretion to vary the shares of the spouses if he is satisfied that

> the contribution of a spouse to the welfare of the spouses and their family during all or part of the statutory regime was substantially less than might reasonably have been expected under the circumstances.[24]

The Ontario regime, on the other hand, only allows variation of the spouses' otherwise equal shares if a division of shareable property would be inequitable having regard to (and having regard only to those factors):

> (a) the duration of the period of cohabitation under the marriage;
> (b) the date when the property was acquired;
> (c) the extent to which property was acquired by one spouse by inheritance or gift; or
> (d) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.[25]

The Manitoba report concludes its substantive recommendations with the blunt statement :

> In according to spouses equal shares in the value of post-nuptual shareable gains, there should be no dis-

cretion vested in the court to vary the equality of sharing.[26]

These may be described as differences in detail but they are important differences in detail. They could make a very great difference when applied to individual cases. These are not the only differences in the substantive provisions of the various reports. There are differences regarding valuation of assets for sharing purposes, classification of property as shareable and so on. What should be appreciated, therefore, is that it is important that it is clear which matrimonial regime applies to a married couple. They are not assured of equal rights under all of the deferred sharing regimes. It is submitted that the proposals of the Alberta, Manitoba and Ontario regimes do not lead to certainty as regards couples' marital property rights. It is further submitted that such certainty is at least desirable and even essential if the social justice which it is the intention of each of the proposed regimes to foster is not to be lost behind a hodge-podge of choice of law rules and contracting out provisions. The colourful pot-pourri of connecting factors contained in the three reports may be of delight to the academic and the litigating counsel, but it can only be the despair of those who must advise spouses as to their property rights and property obligations.

While the regimes of Alberta, Manitoba and Ontario can all be described as involving deferred sharing, the matrimonial property regime being contemplated at present by the province of Nova Scotia is best described as community property with joint managment. The Nova Scotia proposals are only in outline at the moment, and an analysis of its rules of application and so on is not possible. What can be said here, however,

is that a spouse's property rights under the Nova Scotia regime will be different from those of a spouse living under deferred sharing. For one thing, rights in property acquired after marriage will vest as that property is acquired. We have already seen how significant is the fact, in conflict of laws, that rights may be described as 'vested'.

The greater difference between the proposed regime for Nova Scotia and those for the Prairie Provinces and Ontario makes it more imperative that the choice of law rules of the deferred sharing and community property regimes fit together in such a way as to enable people to predict which set of rights will be applied when a court dissolves the marriage of a couple.

V. Conflicts Problems Mortis Causa

So far we have dealt only with the conflicts problems that may arise when the matrimonial property proposals of Ontario, Manitoba and Alberta interact when a marriage is ended inter- vivos of the two spouses. It will be appreciated from what was said in preceding chapters, that it is a principal submission of this thesis that matrimonial property rights and inter-spousal succession rights are just two different methods of effecting the distribution of spouses' assets between them. The fact that traditional choice of law rules apply different connecting factors to 'matrimonial property rights' and 'succession rights' should not blind one to the fact that the legislative intention of a 'succession' law may be the same as the legislative purpose of a 'matrimonial property statute' in another jurisdiction. That one should not be blind to this is crucial where a spouse may have his matrimonial domicile in one jurisdiction that has extensive matrimonial property rights, and his domicile

at death in another jurisdiction that has extensive succession rights. This is true, of course, because the choice of law rule for 'matrimonial property rights' refers to the matrimonial domicile, and the choice of law rule for succession rights refers to the law of the domicile at death.

A word should now be said regarding the implications for the conflicts of laws of the proposals of Alberta, Manitoba and Ontario that are applicable when a marriage ends mortis-causa of a spouse. Of the three regimes, only the Alberta one would apply on the death of a spouse. The Manitoba and Ontario regimes would only apply on the termination of marriage during the lives of the spouses, although each of the legislative packages proposed for these two provinces includes some amendment of a surviving spouse's succession rights. The Manitoba and Ontario proposals contain nothing to amend the choice of law rule for succession rights, so it is to be assumed that these provinces intend succession to moveables to continue to be governed by the law of the domicile of the deceased at the time of his or her death. The rule for immoveables remains unchanged ; the lex situs governs.

The Alberta regime would apply on the death of a spouse, (but only in favour of the surviving spouse). The Alberta regime is declared applicable where Alberta was the last common habitual residence of the spouses. This is a clear change in the common law choice of law rule and raises some problems.

The most obvious problem is that which arises where a couple have their last common habitual residence in Alberta, but their domicile at death in, say, Manitoba. Let us take the most simple example where each spouse is entitled to half of the post-nuptual acquisitions of the spouses under Alberta's regime. Would a widow be entitled to half of the post-

nuptual acquisitions of the spouses under Alberta law and half of the deceased's estate under either the Dower Act or the Devolution of Estates Act of Manitoba? In this, the most typical, it may be assumed, situation, most of the assets will stand in the name of the husband. A claim in the Alberta court under the deferred sharing regime of Alberta, and a claim in the Manitoba court under the succession statutes of Manitoba, could result in a widow receiving three quarters of the marital property of the couple. She could receive half of all the property of both spouses acquired since marriage, and half of the half which her husband would have been entitled to under Alberta's regime, under Manitoba law. This is the sort of succesful claim that was the object of criticism when the case of Beaudoin v. Trudel was being discussed.

This case is slightly different however. In the case of Beaudoin v. Trudel it was the intention of neither the law of the matrimonial domicile, nor the law of the domicile at death, that a surviving spouse should get three quarters of the marital property of the couple. However, in this case, it may be the intention of <u>one</u> of the applicable laws that a widow should get so much. Although the Alberta regime is declared to apply on the death of a spouse, it is not, unlike the Quebec regime involved in Beaudoin v. Trudel, intended to be an exclusive scheme as regards the devolution of a spouse's estate. After the balancing claim is satisfied under the deferred sharing regime it would be open to the surviving spouse, under the law of Alberta, if Alberta was the domicile of the couple at the time of the husband's death, to claim a third, a half, or even all of the deceased's estate, depending on whether there were two children, one child, or no children.

This case therefore, is perceived to be different from the Beaudoin

v. Trudel situation because the legislative intention of one of the laws involved - the law of Alberta - appears to be that a surviving spouse should get more of the deceased spouse's property than is allocated to her by virtue of the matrimonial property regime.[27]

However it is also true that this will not always be the case. It is really only coincidence that the legislative intention of the law of Alberta is satisfied in the example given. While it is true that 'last habitual residence' and 'domicile at death' will, in most cases, coincide, it is also felt that provision should be made for those cases where they do not. Where they do not - and matrimonial property rights are referred to one law and succession rights are referred to another law - the cumulative application of both laws could, as was the case in Beaudoin v. Trudel, leave the legislative intention of both laws unfulfilled. We have already discussed how the legislative purpose of some matrimonial property and some succession rights may be indistinguishable. In the complex choice of law process, however, it would be a pretty fruitless task to attempt to identify duplicative legislative intentions in the individual case, and then cancel the spurious rule where duplication occurs.

Instead of a case by case approach, a worthwhile step towards elimination of the frustration of the objects of laws would be the amalgamation, or the working into a coherent whole, of the succession rules and the matrimonial property of each of the provinces. We have seen how only Alberta is considering succession reform as part of its package on matrimonial property reform. A second valuable exercise would involve investigation of the possibility of having succession rights governed by the same points of contact as those put forward for matrimonial property rights. It is submitted that the policy considerations for a point

of contact ruling succession on death, less strong or rigid than that of domicile, are at least as strong as when matrimonial property rights are being considered. The harmonization of the points of contact would ensure that matrimonial property rights and succession laws were being dealt with by the same law. Thus there would be a greater chance of greater coherence and the greater chance of fully satisfying the legislative intention of at least one system.

Footnotes to Chapter Seven

I. Bill 6 of the 4th Session, 30th Legislature, Ontario, (I977). Introduced by the Hon. R. McMurty, Attorney-General.

2. Ontario L.R.C. op. cit.

3. Bill 6, op. cit., Section I2.

4. Alberta Institute's Report op. cit., Draft Bill No. I Section 2.

5. "Internal Law" is used in various Hague conventions and the term is defined in at least two Acts of the Imperial Parliament enacted to ratify Hague Conventions on wills and adoption.
See Wills Act I963 c. 44 s.6(I) : "Internal law" in relation to any territory or state means the law which would apply in a case where no question of the law in force in any other territory or state arose.
See Adoption Act I968 c. 53 s.II(I) : "Internal law" in relation to any country means the law applicable in a case where no question arises as to the law in force in any other country.

6. Bill 6 op. cit., Section 2(9).

7. ibid., Section 57.

8. Alberta's Institute's Report op. cit., Draft Bill No. I, Section 6.

9. Bill 6 op. cit., Section 54 : A domestic contract and any agreement to amend or restrict a domestic contract are not binding unless made in writing and signed by the persons to be bound and witnessed.

I0. Dicey, op. cit.,Rule I50.

II. ibid.at I099.

I2. Alberta's Institute's Report op. cit., at 80-8I.

I3. ibid.

I4. See Chapter 6, footnote 3I.

I5. Alberta's Institute's Report op. cit., Recommendation #29.

I6. Dicey op. cit., Rule II6 (2) : In the absence of reason to the contrary the proper law of a marriage contract or settlement is the law of the matrimonial domicile, i.e. the law of the husband's domicile at the time of the marriage.

I7. Manitoba Law Reform Commission, Report on Family Law, (I976) Report 23 & 24).

18. ibid., at 92-93.

19. Chapter 5, page

20. It is assumed here that the 'ordinary, habitual residence' must be common, although this is nowhere stated in the report of the Manitoba L.R.C..

21. Manitoba L.R.C. Report op. cit., at 124.

22. ibid.

23. See Chapter 8, footnote 7,

24. Alberta's Institute's Report op. cit., Recommendation #10 (3).

25. Bill 6 op. cit., Section 4 (3).

26. Manitoba L.R.C. Report op. cit., at 134.

27. ibid. at page 125. "Upon termination of the Standard Marital Regime otherwise than by the death of one of the spouses, each spouse would be entitled (in regard to post-nuptual gains) to one half of the value of the combined shareable estates." (Emphasis added) It would appear therefore that the Manitoba regime only applies inter-vivos of the parties. The share of spouses' property that a spouse would get on death under Manitoba law would depend entirely therefore upon the succession provisions of that law. The cumulative application of Alberta's deferred sharing regime and the succession provisions of Manitoba would frustrate the legislative policy of Manitoba law.

PART THREE

In this, the last part of our thesis, we consider how a solution to the problems we have outlined may be arrived at. We also consider the form that a rule that will solve our problems may take. We finish with a plea that some sort of rule be adopted, or at least discussed, before all the provinces complete reform of their various matrimonial property laws.

CHAPTER EIGHT

SOLUTIONS TO THE CONFLICTS PROBLEMS EXPOSED

I. Introduction

Having examined some of the problems consequent to the introduction of various matrimonial property regimes by certain of the provinces of Canada, it is now our purpose to explore the possibility of solutions to these problems. Just as our study of the conflicts of laws problems, raised by the introduction of different forms of matrimonial property reform, revolved around the application rules of the various schemes, so this discussion will concentrate on finding a choice of law rule that will show us the way out of these difficulties.

II. How a Solution Would Become Effective

It appears that there are various ways that such a choice of law rule, or rule regarding the application of the matrimonial property regime, could effect a solution. The first point that should be made, although it is an obvious point, is that the same choice of law rule should be adopted by all of the provinces of Canada. This, however, proceeds on the assumption that there will be differences great enough between the various provincial regimes, to make a choice of law rule necessary. We have already seen that, as the schemes for reform stand, sufficient differences exist between the projected provincial matrimonial property laws to make a clear choice of law rule essential. Before going on to deal with the uniform choice of law rule, therefore, time will be taken to discuss the possibility of harmonization of the substantive laws on matrimonial property.

We have already seen that if all of the provincial matrimonial property laws were the same, choice of law problems would be false conflicts of laws. Rights once held under the matrimonial property law of one province could be lost and replaced by rights under the matrimonial property laws of another province, with no change in the substantive rights and duties accorded to each spouse, if all the provincial matrimonial property laws were the same.

A medium already exists whereby discussion of a uniform matrimonial property statute might take place - the Conference of Commissioners on Uniformity of Legislation in Canada. This body first met in 1918 and one of its declared objects is to promote

> ...uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces.....[1]

Although the area the Commissioners had originally intended to concentrate on was that of commercial law, the attention of the Commissioners has not been devoted exclusively to that. The modus operandi of the Conference involves the preparation of Draft Acts or Model Acts, which Acts are then adopted by any interested provinces.

Examination of the history of the Conference of the Commissioners on Uniformity of Legislation[2] leads one to doubt whether this body would be successful in promoting a uniform Act on matrimonial property. It has been the experience of the Commissioners that the success of past efforts at uniformity in other areas has been limited. This has been especially true as far as Quebec is concerned. We have already seen how serious conflicts of laws problems can arise in relation to Quebec's matrimonial property law interacting with the matrimonial property laws of the other

provinces. A uniform law that does not enjoy the approval of Quebec would still be valuable, but it would be that much more valuable if the civil law province adopted it.

Leaving the Commissioners of Uniformity for the moment, are there any other ways that uniformity of the substantive law on matrimonial property could be achieved? Is co-operative federalism the only possible way? Can one make out an argument for federal regulation of the area of matrimonial property? Would an act by the Parliament of Canada on matrimonial property be constitutionaly valid?

The Special Joint Committee on the Canada Divorce Bill recommended that division of matrimonial property should also be dealt with in the new legislation.[3] Such regulation would presumably have been under the federal power to regulate marriage and divorce under section 9I (26) of the British North America Act I867. This recommendation was rejected by Pierre Trudeau, then Minister of Justice, because he felt that such legislation would be ultra vires of the Dominion as it would deal with a matter within provincial legislative jurisdiction under section 92 (I3) of the British North America Act:

> It is certain that some possessions, those which perhaps come from the marriage tie itself, could be regulated under federal jurisdiction. But, in practice, since it will be difficult to distribute these possessions which are often worth little in comparison with the personal property of the husband and wife, it would have been a mistake to try and decide how property should be divided by the present legislation.[4]

It is uncertain in the writer's mind exactly what the then Minister of Justice meant by possessions which "come from the marriage tie itself". Perhaps he was referring to Dower Rights. These seem to be one of the

few exceptions in the common law provinces to the general rule that marriage has no effect on the property rights of the parties. In any case, in so far as deferred sharing is involved, perhaps a cogent argument could be made out for the proposition that, as the'expectation'or 'right' to claim half of the post-nuptually acquired assets flows directly from the fact of marriage (given the qualification for the Alberta regime that the spouse must behave as a spouse is reasonably expected to behave) then, on the rationale above, such a right or claim should be regulated by the Federal legislature.

The position adopted here, however, and the position generally adopted, is that for theoretical and practical reasons, enactment of a deferred sharing regime would never be undertaken by the Dominion.

While there are compelling arguments for allowing maintenance between spouses to be dealt with by the Federal Parliament, these considerations do not hold as regards matrimonial property regimes. The mutual duty of support is a basic feature of married life. While it is recognised that property and maintenance shade into one another, the case law indicates that section II of the Divorce Act should not be used to effect capital distribution of spouses' assets.[5] What is the theoretical distinction between mutual support and marital property? It is submitted that the establishment of a matrimonial property regime is not basic to the continuance of conjugal society in the way that a duty of support is. A mutual duty of support can be looked on as the economic adhesive of a household. Community or deferred sharing is of a different complexion. Equal rights in matrimonial property have, as their primary aim, the fostering of individual self-determination and self-realisation. They provide a degree of security and independence for the individual spouse,

usually the wife, which she could not obtain through total reliance on the other spouse. While a matrimonial property regime may, by giving equal rights in acquisitions, benefit the individual (and thereby the family unit) it does not go directly to supporting the familty unit in the way a mutual obligation of support does. It deals with property rights of spouses, not marital duties inter se.

On the practical level, it has probably been accepted for too long that legislative jurisdiction over matrimonial property lies with the provincial level of government, for the federal government to make a successful attempt at wresting jurisdiction away from the provinces.

Federal legislation as a route to uniformity of matrimonial property laws, and the enactment of a uniform matrimonial property statute produced by the Commissioners of Uniformity of Legislation, having been considered and having been shown to be improbable solutions to our difficulties, we shall now examine the alternative method of achieving a solution.

It is believed that there would be a greater chance of achieving provincial unanimity over a uniform conflicts of laws rule than over a uniform matrimonial property statute. It will be appreciated that the basic thrust of many of the provincial plans for reform that we have studied is the same. All of the deferred sharing regimes we looked at, aim at equal sharing of post-nuptual assets between spouses. In so far as regimes are similar, it may be easier to resolve conflicts between them. Provinces with an interest in having spouses' affairs governed by their regime will be less unwilling to agree to a rule which might subject spouses' affairs - or part of these affairs- to the regime of another

province if there is an assurance that the regime of that other province approximates to their own. This may even be arguable in relation to Quebec. The rule of immutability, which probably distinguishes the Quebec conflicts rules, is founded on the notion that it would be inequitable for a couple to leave their matrimonial domicile, where they married under the Civil Code's version of deferred sharing, and have their property rights inter se change as a result of that change of home. The rule is primarily designed to protect the wife, who might have no property rights in the post-nuptual acquisitions under the laws of a foreign jurisdiction. If it could be shown that the laws of these foreign jurisdictions, i.e. the common law provinces of Canada, gave a wife rights in post-nuptual acquisitions similar to the regime legal of the Civil Code, then Quebec might well be prepared to amend the rule of immutability.

When such a base for unanimity exists between the provinces it is believed that the chances of success by the Commissioners on Uniformity of Legislation would be much greater. A study of the work of the Commissioners reveals that their greatest successes came in areas where there was at least one of the following factors - either little controversy over the subject dealt with, or a powerful pressure group lobbying for uniformity. A good example of Model Acts in the latter category are those on Life Insurance and Fire Insurance, which were heavily supported by the Association of Superintendents of Insurance.

It is submitted that both these elements might exist, at least to some degree, in relation to our area of study. All of the provinces we have studied seem committed to the idea of sharing post-nuptually acquired assets. Most of them intend that this should be achieved through the medium of deferred sharing. The role of a powerful lobbyist might be taken

over by the federal government. The federal government might be persuaded to fund a study by the Commissioners on Uniformity. Lack of adequate funds is one of the reasons that the Commissioners have had only limited success in the past.[6]

III. The Form of a Uniform Conflicts Rule

Although we have submitted that it is unlikely that a uniform matrimonial property statute will be enacted by each of the provinces, a few words could be said about the form that such a statute could take in case this is the direction that any future action may take. Also, some of the remarks made here will apply to our uniform conflicts rule.

It will not be our purpose here to set out the ideal matrimonial property statute. Space does not permit such a discourse. Our concern is with the technical legal problems that may arise once the legislative choice has been made as to the social content of the reform. Two points as to content may be usefully made, however. Firstly it should be again stressed that any matrimonial property reform that does not take into account the related area of inter-spousal succession can only be of limited value. If succession rights are not considered then the way is left open for mis-characterisation and the defeat of the purpose of reforming legislation. The succession laws of the various provinces are different and, it is submitted, sufficiently different to lead to anomalies even after the adoption of a uniform matrimonial property law or the adoption of a uniform conflicts rule, if these succession laws are not considered along with the marital property laws.

Secondly, serious consideration should be given to the points of contact used in the application rule of any uniform statute. This would

not be so important when one is considering a uniform matrimonial property statute - then it ceases to matter where, in any of the provinces who have adopted the uniform rule, a couple have their domicile, habitual residence or whatever. It will matter where some of the provinces do not adopt the uniform statute. It will matter also, of course, where a uniform conflicts rule is the solution adopted. It is recognised that domicile is not a satisfactory point of contact for a uniform statute. The various artificial features in the concept as it is understood in the conflicts of laws, militate against its acceptability today. Domicile, however, does have one sure advantage over other concepts such as residence, and habitual residence. It is definitely exclusive. A person can have no more than one domicile, for the purpose of fixing matrimonial property rights at least,[7] at any given time. Residence and even habitual residence do not have this virtue. While it is recognised that habitual residence, or some closely related concept, would be a preferable point of contact in a matrimonial property statute because it avoids the artificiality of domicile, what should be provided in such a statute is the following: There should be some indication of the factors that are to be considered when one is assessing whether or not a person is habitually resident in a given jurisdiction. An indication of such factors would make up for another advantage that domicile has over the newer concept - its definition by precedent. We have already seen how the only two cases on habitual residence do not shed much light on the subject. There should also be a statement that habitual residence (if that is the formulation employed) is exclusive. Addition of the term 'ordinary' onto habitual residence might be conducive to exclusiveness.[8] The adoption of at least these simple measures would perhaps ensure a useful and even uniform interpretation of the concept as

a point of contact in the uniform law.

On the 23rd of October 1976, Canada signed a treaty agreed upon at the thirteenth session of the Hague Conference on Private International Law. The first part of that treaty contains a convention on "the law applicable to matrimonial property regimes".

Discussion on the law applicable to matrimonial property regimes has been going on among various international law organizations for some years,[9] and this treaty arrived at by the Hague Conference may be regarded as the culmination of these deliberations. The 1976 treaty replaces an earlier treaty on the conflicts of laws relating to "the effects of marriage on the rights and duties of the spouses in their personal relationship".[10] This earlier treaty enjoyed only limited success however,[11] and it is very rarely referred to in any of the academic treatments of conflicts of laws.

The value of the 1976 treaty to Canadian inter-provincial conflicts is, of course, limited by the same constitutional considerations that we discussed when dealing with the possibility of a uniform federal matrimonial property statute. It has long been accepted that where the subject matter of an international treaty falls within provincial legislative jurisdiction, only the provinces have the competence to implement the agreement. While the federal government may contract with other nations and become party to international agreements, it remains up to the provinces to translate these treaties into legislation in so far as the subject matter of the treaties falls within section 92 of the British North America Act. This was the result of the decision in the Labour Conventions Case,[12] and although that decision has been criticized

repeatedly as emasculating the international status of Canada, the rule from the case has never been changed.

The value of the Hague Convention to the provinces, should they decide to adopt it, is also somewhat limited by the fact that the Convention relies heavily on the concept of nationality. The Convention does, however, recognise the problems that this might cause countries like Canada, and provision is made for an alternative choice of law rule in Article 16:

> For the purposes of this Convention, where a State has two or more territorial units in which different systems of law apply to matrimonial property regimes, any reference to the national law of such a State shall be construed as referring to the system determined by the rules in force in that State.
> In the absence of such rules, a reference to the State of which a spouse is a national shall be construed.....as a reference to the territorial unit where that spouse had his or her last habitual residence.....13

It is submitted that this Convention, suitably adapted to fit the needs of inter-provincial conflicts problems, would be a useful blueprint for a uniform conflicts rule. The Convention contains as its main principles, rules for the choice of law, which we believe to have a valuable potential for solving many of the problems we have outlined in our study.

The Convention cannot provide the answers to all of the difficulties we have outlined. For instance, the Convention nowhere contains any definition of one of its principal connecting factors, namely habitual residence. This, however, would not cause too much trouble to rectify. A simple definition section inserted in the provincial Act would fulfill the purpose. It is also true that the Convention deliberately avoids dealing with succession rights between spouses. We have stressed repeatedly

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that 'matrimonial property' property rights and 'inter-spousal succession' rights should be looked at together. The Special Commission which presented the draft convention to the Conference recognised this problem, that we earlier identified as one of characterisation. In the Introduction to their report on the Preliminary Draft Convention, the observation is made:

> The exact delimitation of the scope ratione materiae of the Convention is a particularly delicate task. Since the scope of the matrimonial property regime and its delimitation in relation to other spheres of law, and particularly in relation to the law of succession, differ with the States concerned, one must grant that there should be a 'grey zone' which will be considered at one time to be subject to the Convention and at other times to be outside of it. Thus, article one simply gives a non-exhaustive list of excluded matters, without fixing their limits in relation to matrimonial property regimes.[15]

The Commentary on the Preliminary Draft may also be referred to:

> The exclusion of the law of succession was undoubtedly necessary. It is nonetheless true that questions of the winding-up of the matrimonial property regime and questions of succession often arise at the same time. The application to one set of questions of a law different from that applied to the other questions not only leads to difficulties of delimitation, but may also bring about inequitable results. Therefore legal writers have frequently postulated de lege ferenda systems of connecting factors leading to the submission of the matrimonial property regime and the succession to the same law.[16]

As far as the common law provinces of Canada are concerned, it is believed that they are sufficiently similar in legal institutions that agreement could be reached between them as to where succession rights and matrimonial property rights overlap or meet. It would not be too difficult, perhaps, for them to agree that inter-spousal succession and matrimonial property rights be referred to the same law indicated by a uniform conn-

ecting factor such as last common habitual residence.

It may not be so easy where Quebec is concerned. However, even there, an intelligent characterisation of the rights and duties accruing to each spouse by virtue of the Code Civil's provisions on married persons, might provide the basis for a solution. It is believed that the primary obstacle in the path of uniformity is not the problems presented by characterisation of the spouses' rights under Quebec law, but rather the acceptance by that province of the principle of mutability; mutability is the basis of most of the provincial schemes as they stand, and it plays an important role in the Convention.

Recognising these drawbacks therefore (and postulating how they may be overcome) we shall go on to consider the substantive provisions of the Hague Convention.

IV. The Hague Convention

The Convention gives two types of connecting factors to indicate the laws that will govern a matrimonial property regime - subjective and objective connecting factors. The subjective connecting factor is the one chosen by the parties themselves and it will take precedence over the objective connecting factor if the parties do, in fact, choose an applicable law. The spouses do not have complete freedom in choosing the law that is to govern their propietary relations, but the range of choices they have under the Convention appeared broad enough to the Conference to recognise the autonomy that parties should have in relation to their rights and duties. In describing the provisions of the Convention the Articles will be adapted, in accordance with the Convention, to take account of the non-unitary legal system in Canada. Also where the term

'State' is used in the Convention, 'province' will be substituted.

Spouses may choose one of the following laws to regulate their matrimonial property regime:[17] (i)[the law of any State of which either spouse is a national at the time of designation][18]

(ii) the law of any province in which either spouse has his or her habitual residence at the time of designation;

(iii) the law of the first province where one of the spouses establishes a new habitual residence after marriage;

The spouses also have the option, notwithstanding a choice from the above laws, to designate the lex situs as the applicable law to govern the ownership of any of their immoveable property.

It is believed that these provisions would find acceptance with most of the provinces whose matrimonial property schemes we have studied. They employ the concept of habitual residence, which is the concept around which Alberta's rules revolve. They allow choice by the parties of the law which is to govern their affairs and this would not be repugnant to the schemes we have considered. It is believed that the rules are also valuable because they allow spouses to choose the law of the intended place of habitual residence. This overcomes the problem of spouses continuing to be subject to the law of the place where they were both domiciled at the time of marriage, when they intended to quit that place immediately upon celebration of the nuptuals, and where they did, in fact, so emigrate. Such a provision would be especially valuable as a remedy to Quebec's rule of immutability.

The choice of law option may not be used much should this Convention be adopted as a basis for a uniform provincial conflicts rule on

matrimonial property regimes. It is generally recognised that those intent on marriage, in common law Canada at least, rarely address their minds to an ante-nuptual marriage agreement. Perhaps greater awareness of the proprietary aspects of marriage will filter down to the citizens as a result of the reforming ferment that is going on in Canada, and perhaps that, in turn, will lead to an increase in the number of marriage contracts made. Once couples are intent on a marriage contract they may be fortunate enough to take advice from a practitioner who is aware of the thorny conflicts of laws problems that might arise should his or her clients move their home to another province. If so, a choice of law clause would obviate many of the difficulties we have been discussing.

The objective connecting factor is the one imposed on couples should they not designate an applicable law from the choices in Article 3. The primary objective factor is the internal law of the province in which both spouses establish their first habitual residence after marriage.[19] It will be appreciated that this squares conveniently with the main connecting factor employed by the Alberta regime - common habitual residence. The Alberta regime does not seek to regulate spouses' affairs unless they are habitually resident in the province. The only exception to this is where the spouses have no common habitual residence. In such a case the objective connecting factor provided by the Convention does differ, in its formulation at least, of the choice of law rule:

> If the spouses do not have a common habitual residence in the same province.....their matrimonial property regime is governed by the internal law of the province with which, taking all circumstance into account, it is most closely connected.[20]

The Alberta regime seeks to regulate spouses' affairs when spouses have not established a common habitual residence, if the couple are resident in Alberta at the time of the marriage. It is probable that if a couple are held to be resident in Alberta at the time of the marriage that this province would be held the one with which the matrimonial property regime of the spouse was the most closely connected. The most obvious exception to this observation would possibly be where a husband had his domicile outside Alberta at the time of the marriage. There one would imagine that the Convention rule might look instead to the ante-nuptual domicile of the husband as the jurisdiction with which the couples' matrimonial property regime had its closest connection. Such an assumption would be unjustified however , as the very tenor of the Convention, and certain comments in the report on the Preliminary Draft Convention, indicate a deliberate move away from any rules that would "impose a strain on the principle of equality between a husband and wife".[21] Where the connecting factor provided by the Convention might depart in result from the Alberta rule is in that case where a couple were both resident in Alberta at the time of the marriage and where they had no common habitual residence, but where the ante-nuptual domicile of both parties was outwith Alberta and in the same province. There the Convention rule might hold that the parties' property rights should be regulated by the law of that common ante-nuptual domicile, while the Alberta rule would hold the parties governed by the Alberta regime.

There are special provisions relating to the application of the law of the last habitual residence of each spouse in preference to the primary objective connecting factor, where the province which is the jurisdiction where the spouses had that last habitual residence makes

a special declaration that its law should apply to such couples. This provision was originally intended to apply the common national law of spouses where spouses had a common nationality and where a state had a special interest in applying its internal law to its own nationals. After adaptation it loses much of its impact and importance. Also one would imagine that no province in Canada would have an overwhelming interest in applying its own law in preference to the reformed laws of any of the other provinces. The position might be different if some of the provinces who adopt the Convention retain separation of property as the system for married couples.

The objective connecting factor of the Convention is felt to be one which would be useful in our area of inter-provincial conflicts. Common habitual residence is a connecting factor which is similar to, if not identical with, those of the three regimes we studied in the previous chapter. By concentration on the internal law of the the common habitual residence, the complications of the renvoi should be avoided. All these factors should militate for its acceptance.

Where the Convention departs radically from the application rules we have studied, and from the Canadian conflicts rules on matrimonial property, in so far as these are ascertainable, is in its treatment of the conflit mobile, or the situations in which the connecting factor changes. The distinction is drawn again in the Convention between subjective and objective connecting factors. During the marriage spouses may effectively subject their propietary relations to the law of the province in which either spouse has his or her habitual residence at the time of the choice. The added option of the lex situs is given in the

case of immoveables.

Where spouses do not designate an applicable law, either expressly, or by implication by the formation of a marriage contract, and where the spouse change their place of habitual residence, the internal law of the place where they become habitually resident shall become applicable, if the parties have had that new habitual residence for at least ten years. The law of the new habitual residence only has effect, however, as to property acquired after the change of applicable law.

Before going on to comment on the objective connecting factor where spouses have changed their homes, we should mention that the terms of Article 7 are thought to be ambiguous. The wording of that provision leaves us unsure when the actual change of applicable law takes place. Reducing the actual article to its essential parts we have:

> ...the internal law of the [State] in which they both have their habitual residence shall become applicable .....when, after the marriage, that habitual residence has endured for a period of not less than ten years,.....22

It is submitted that this could mean that the change of applicable law only takes place after the ten year period, or that it takes place on the change of residence, but it is only given effect to if the habitual residence endures for ten years. The difference between the two interpretations is important because only property acquired after the change of applicable law is affected by the new law.

The report on the Preliminary Draft can give us no help here as it proceeded on a different footing with regard to this connecting factor. It is thought that the interpretation which fixes the change of applicable law at ten years after the change of habitual residence is probably the

most literal. It, however, even more than the alternative interpretation, comes in for criticism on the ground that it will cause technical difficulties of accounting. These criticisms will be looked at generally in the next part of this discussion.

This version of limited mutability is essentially the same as that which has been adopted in the United States for many years. The conflicts jurisprudence of that country subjects spouses domiciled in a community property state, to the matrimonial property regime of that state - but only with regard to property acquired while domiciled there. Property brought from another jurisdiction continues to be governed by the laws of that jurisdiction - even if it is exchanged for new property in the new jurisdiction. We have already described this phenomenon as the 'tracing' or 'source' doctrine. Once spouses move their matrimonial domicile, they become subject to the law of the new domicile, in so far as property acquired after the change is concerned.

The only difference in the Convention's approach is that the connecting factor of habitual residence replaces that of matrimonial domicile, and there is no explicit formulation of the tracing doctrine. It is submitted however, that a rule which seeks to apply the law of the new habitual residence only to property acquired after the change of applicable law (whenever that may take place) must have a version of the tracing doctrine as its partner if it is to function effectively.

Our arguments for and against mutability will not be repeated here. We will refer to relevant sections of the report on the Preliminary Draft Convention where the various policy considerations are set out clearly and concisely:

> Permanence has the advantage of establishing a stable regime, but it may lead, however, to the spouses being governed by a law with which they have no longer any connection. Conversely, mutability submits the matrimonial property regime of the spouses to a law with which they are effectively connected, for example because it is the law of the social environment in which they live (habitual residence). But, particularly when a connecting factor such as habitual residence which may be changed after a short period of time and frequently, is retained mutability brings on instability which may be prejudicial to the spouses. Considerable complications may result when it is necessary to consider the situation retrospectively in connection with the winding up of the regime... Accordingly, the Experts agreed that a middle road had to be found.[23]

As to the eventual form of the middle road chosen by the Experts:

> The property that the spouses had at the time of the change remains subject to the law previously applicable. According to a metaphor that has been employed, the spouses as a consequence, drag behind them a train comprising as many carriages as there were laws successively applicable to their matrimonial property relations. It is clear that, when the regime is liquidated, this system may provoke considerable complications and difficulties of proof. This is the reason why spouses have the possibility to submit all their property to the new law.....[24]

The submission is made here that this limited mutability approach is the one to be preferred because it has the sounder jurisprudential and sociological base. It is sounder sociologically because it promotes the assimilation of immigrant spouses into the environment they have made their home or habitual residence. Lest this be considered a chauvinistic and unworthy goal, mention should be made of the provisions in the Convention which allow spouses to choose the law they wish their property relations to be governed by. Spouses can, of course, stipulate that the law of 'the old country' shall apply to them if that was the place where

at least one of them had his or her habitual residence at the time of the choice, or if that was the first habitual residence of the spouses after marriage.[25]

This approach is sounder jurisprudentially because it avoids the pitfalls of the vested rights approach and the difficulties of the contrat tacite. It is an approach from which, given an accurate record of spouses' affairs, their rights and duties are easily assessed.

It is believed that the main difficulties with this approach are of a technical nature. It may be difficult, after many years of married life and several changes of home, to say which property should be governed by which system. These are the difficulties and complications spoken of in the extract from the report. The rejoinder can be given, however, that the achieving of a just solution to the problem of whether mutability or immutability be used is not an easy matter. Justice is a complex state of affairs and that state will not be arrived at without real effort. A few comments, however, might indicate that the problem is not an insoluble one.

We have already seen that spouses can choose the law applicable to their affairs. Such a choice is to be taken as indicating the law which will govern the disposition of all their moveable property. Where this choice is made, the accounting difficulties will be greatly allieviated, as only one legal system will have to be considered, at least in relation to all of the spouses' moveables. There is the possibility that some of the parties' immoveables will be subject to the law of the situs. That is a connecting factor which will not change, of course.

There is also the point that, in many cases, previously applicable systems will play no part in the disposition of spouses' property

either because neither spouse has any reason to lead proof of the law of a previous habitual residence,[26] or because parties may have come to the jurisdiction where they established a second habitual residence, and where their matrimonial property relations are in foro, with little or no property. This will be the case with many immigrant spouses - those who leave the land of their fathers immediately upon marriage with the intention of settling permanently in the new country.

The three schemes that we concentrated upon in the previous chapter all had some form of presumption that the property of the spouses was shareable.[27] In the case of inter-provincial conflicts, if it comes about that the bases of the various reformed matrimonial property laws are the same, these presumptions of shareability could be amended to the effect that property is presumed shareable by the law of the last common habitual residence of the couple. It may be that the presumptions as they stand have that effect in any case, especially when one considers that a court will only apply its own law until evidence of some foreign law is lead.

The area of difficulty that remains after these comments are considered is, it is admitted, a real one. It would be considerably lessened if spouses kept accurate records relating to the ownership of their property. Records may well exist for major assets such as the matrimonial home, automobiles and other items for which credit is taken. For other items, unless a spouse is determined to keep property 'his' and 'hers', and documents the financial course of the marriage with the accuracy necessary for formal proof in a court of law (a circumstance which would, one can surmise, quickly lead to the accuracy of the records being tested), the couple will probably find themselves

relying on the presumption of equal sharing.

With regard to the specific proposal in the Convention as to the objective connecting factor for the conflit mobile, or what we earlier called the 'dynamic situation', the criticism is made here that the ten year period is an arbitrary restriction. It is also considered to be too long, even if one does accept that a definite time period must be spent in a jurisdiction as habitual residents before the law of that jurisdiction regulates one's marital property rights.

The comments in the report on the Draft Convention do indicate an awareness of these criticisms and they may be set out here to indicate more fully the choices that are open:

> [Article 7] is based on the idea that a long habitual residence in another country may justify a change of applicable law.....Opinions were divided on the length of this period. The supporters of permanence advocated a relatively long period of the order of ten years, whereas certain Experts, favourable to mutability, would have been satisfied with three to five years. For this resaon, the Special Commission preferred not to fix the number of years, but, on the contrary, to submit the problem to the Governments with a view to a decision [by them].
> The fixing of a term of years inevitably has something arbitrary about it, the true integration that should justify a change of applicable law being essentially variable according to the circumstances.[28]

If this Convention is accepted as the basis for a uniform provincial conflicts rule, it is submitted that the rule would be improved by ommission of the ten-year period. If the basis of each province's matrimonial property law is that gains made during marriage should be shared between spouses there would be no need for such a long waiting period before spouses became subject to the law of their new home. The length of the waiting period is related to the diversity of property systems the spouses

might encounter on their peregrinations. The more diverse these systems, the greater the need to ensure that spouses do have a significant connection with a jurisdiction before subjecting them to the marital property laws of that system. It is felt that the marital property reforms being contemplated are sufficiently similar to justify shortening the ten year period or even ommitting it altogether. There appears to be several options open to the provinces.

The first is to shorten the period that spouses must be habitually resident in a province before they become subject to the law of that province. The substitution of a three or five year period would be preferable, but it would still have the element of arbitrariness about it. Such a provision would be definite,however.

The second alternative would be to adopt a strict test of habitual residence. We have already advocated that habitual residence be defined in any matrimonial property statute and that the test should be a fairly strict one. A strict test would prevent spouses having their matrimonial property affairs governed by a law with which they might have no real connection. In this case a strict test would make an arbitrary waiting period redundant and allow the court to take the circumstances of each case into account, and would enable the court to ascertain if true integration had taken place.

A third possibility would involve a combination of the two previous alternatives. A strict test of habitual residence, coupled with a time period under which spouses' affairs could not be regulated by the new law, might provide that combination of flexibility and certainty which would be acceptable to the legislators and their customers.

Our fourth alternative might attract the criticism that it is

vague and that it leaves too much up too the bench. It too, might have its virtues, however. Our last suggestion is what might be termed a 'sliding scale presumption',and might be set out thus in a uniform provincial conflicts rule to deal with the conflit mobile:

(i) The law applicable to a married couple's matrimonial property regime shall be the internal law of the province where both spouses establish their first common habitual residence after marriage, notwithstanding any change of habitual residence by the spouses unless that change of habitual residence has endured for a period of not less than [one year];

(ii) The law applicable to a married couple's matrimonial property regime shall be the law of the province where they have their habitual residence if that habitual residence has endured for a period greater than [ten years];

(iii) If the law applicable to the matrimonial property regime of the spouses is not determined by section (i) or (ii) above, the court shall determine the law applicable to the spouses matrimonial property regime by reference to the following criteria:

(a) In so far as the law of a previous habitual residence of the spouses subjected the spouses to deferred sharing, and the law of the present habitual residence does not, the law of the previous habitual residence shall be applied.

(b) Subject to sub-section (a) above, the law of a previous habitual residence of the spouses shall be presumed to apply but that presumption shall weaken according to the length of time that the spouses have had their habitual residence in the present jurisdiction.

(c) Subject to sub-section (a) above, it shall be open to either spouse to lead evidence that the law of the new habitual residence should apply, having regard to factors that would indicate acceptance by the spouses of the law of the new habitual residence as the law which should regulate their matrimonial property regime.

(iv) It is declared that a change of applicable law pursuant to this rule will have effect only from the time that a couple are found by the court to have changed their hab-

itual residence where that habitual residence is found by the court to be the basis of a change of the applicable law.

It is the intention of this rule that the law of the new habitual residence cannot apply unless the spouses have been habitually resident in the new habitual residence for at least the period set out in the final part of section (i). The first part of section (i) is , of course, only the primary objective connecting factor of the Convention. The actual length of the period in section one can be varied, but it is suggested that it be no longer than 2 years. The longer it is the less time the court has to give play to the presumption in section (iii). The court's discretion is similarly shortened the shorter the period in section (ii) is. If the period in section (ii) is increased, the period the court can give play to section (iii) is increased.

If mutability is favoured over immutability the presumption in (iii) can be reversed. The rule as it stands, was framed to favour immutability because it is believed that continuity of the legal system governing spouses' affairs is important. The bias in favour of immutability is,however, only given play in the period between the time limits set out in sections (i) and (ii). We see a further bias in favour of immutability if the law of a previous system would apply deferred sharing to a couple.[29] This bias is again subject to sections (i) and (ii), but it overcomes the presumption set up by (iii)(b). If the provinces were sufficiently in favour of deferred sharing they could make (iii)(a) apply even in opposition to the two main rules contained in sections (i) and (ii). That would give a rule similar to that which the Alberta regime has to apply to couples who establish a common habitual residence in Alberta, but who are already subjeet to deferred sharing. Our rule would

only apply in cases where the law of the new habitual residence did not apply deferred sharing, however.

It is believed that a bias in favour of continuing deferred sharing regimes is desirable for two reasons. Firstly, apart from all of the other arguments in favour of some form of community of property, it is believed that most couples do practice community of property, at least as long as everything is going smoothly. Spouses' property is usually 'ours' and not 'his' and 'hers'. This rule merely seeks to continue the de facto ideal situation, and to recognise it in law. Secondly, an express rule continuing a deferred sharing regime will lead us away from all the difficulties that trammel the theory of vested rights as it may apply to deferred sharing, and away also from the conceptual difficulties of a possible tacit contract approach.

It will be noticed that sub-section (iv) seeks to restrict the effect of a change of applicable law to that period after the change of habitual residence. The change of habitual residence does not, in itself, mean that the applicable law is changed, but if the court finds that there has been a change of the applicable law after a change of habitual residence, the property acquired after the change of habitual residence will be affected. This provision seeks to avoid the ambiguity that we identified in the similar provision in the Convention.

A choice may therefore be made between the four alternatives we have set out here, and the rule as it is set out in the Convention. The sliding scale presumption might, as was said, be criticized as too vague. It is believed, however, that it does represent a useful 'cross' between unfettered discretion and a rigid rule of law. Both these extremes would

attract criticism as leading inevitably to injustice in various situations. The rule is also useful in that it can easily be changed to take account of a different view of mutability.

Our sliding scale presumption might also attract criticism on the ground that presumptions are archaic devices, better used to cover deficiencies in systems that are in need of overhaul, and better kept out of the sleek, new legislation on matrimonial property. A presumption might be regarded as artificial and as an illusory fetter on discretion. To these criticisms the answer would be made that the only important question that should be asked is "Will it work?". The answer to that question being, of course, "If the courts want it to work, it will". We see no good reason why the sliding scale presumption would not fare well at the hands of the judiciary. It gives them a clear choice and clear boundaries within which to make that choice. The area between gives the judge an opportunity to do real justice in the instant case.

A word or two should be said concerning the provisions of the Convention relating to marriage contracts. Under Article I2 a marriage contract is valid as to form if it complies with either the internal law which is applicable to the matrimonial regime or with the internal law of the lex loci contractus. These rules probably do not add much to the common law on marriage contracts. In most cases the law of the parties' habitual residence will also be the law of the husband's ante-nuptual domicile, which is presumed to be the proper law of the marriage contract. In other cases the form of the deed will be dictated by the law of the place where it is made, so the lex loci contractus and the proper law will be the same. The difficult question, which is left open by the rule,

relates to what can be described as a matter of form, and what can be described as a matter of procedure and therefore governed, not by the lex loci contractus or the law applicable to the matrimonial regime, but by the lex fori. This area was discussed in chapter five.

V. Conclusion.

In summary, therefore, we have a Convention which has been approved by the Federal government, which we believe can serve as a useful basis for a uniform conflicts of laws rule. The fact that the Federal government is a signatory to the Convention may be taken as an indicator of the fact that it approves of the methods used in the Convention to obviate the kinds of conflicts of laws problems it has been our purpose to describe. If this is so, then perhaps the Federal government would be willing to come forward and encourage discussion among the provinces on the possibility of a uniform conflicts statute based on the agreement reached at the Hague last year. Expenditure now on fostering a model statute on the law applicable to matrimonial regimes will be more than justified by the saving in judicial time and public money, if the potential conflicts we have described in earlier chapters are kept out of the courts.

We have indicated that the Hague Convention is not a conflicts panacea. We have also suggested ways of improving it. It should be appreciated that the value of such a rule would not lie so much in the method it adopts to solve conflicts problems, and not so much in its sophisticated choice of law rules. The real value of the Convention as the basis for a uniform conflicts rule would be in its applying to all the provinces. The fact that a uniform rule would exist for all of the

provinces of Canada would do more to obviate conflicts problems than hours of learned discussion on whether immutability or mutability accorded more with social reality. The mettle should be grasped and a rule hammered out before the reforming fires die away.

Footnotes to Chapter Eight

I. Lafleur, Uniformity of Legislation, Proceedings of the Canadian Bar Association I, (1915) at 22.

2. See e.g. Palmer, Federalism and Uniformity of Laws: The Canadian Experience, Law and Contemporary Problems (1965) Vol. 30, 250.

3. Report of the Special Joint Committee of the Senate and House of Commons on Divorce, June 1967 at 28 and 29. See also Debates in the Committees of the Canadian Senate (Standing Committee on Banking and Commerce Nos. 1-29, 1967-68 at 207-213).

4. House of Common Debates 5/12/67 V page 5089.

5. Krause v. Krause (1976) 2 W.W.R. 632 (Alta. C.A.).

6. Palmer, supra.

7. Domicile may be defined for the purpose of the Citizeship Act differently than it is defined for conflicts purposes. Also one could argue that married women can have two domiciles when they have a separate domicile for the purposes of divorce.

8. Chapter 5, page 87.

9. See e.g. The International Law Association, 54th Report, 1970.

10. Hague Convention of July 17 1905.

11. Philip, Hague Draft Convention on Matrimonial Porperty, (1976) 24 I.C.L.Q. 307.

12. Attorney-General of Canada v. Attorney-General for Ontario et. ors. [1937] A.C. 326 (J.C. P.C.), [1937] 1 D.L.R. 673.

13. Hague Convention of The Law Applicable to Matrimonial Property Regimes, 1976, Article 16.

14. Hague Convention, supra, Article one: "The Convention determines the law applicable to matrimonial property regimes. The Convention does not apply to.....(2) succession rights of a surviving spouse;....".

15. Prelininary Draft Convention adopted by the Special Commission and Report by Alfred E. von Overbeck, Law applicable to matrimonial property regimes, 1975 at 11.

16. ibid at 20.

17. Hague Convention op. cit., Article 3.

I8. This rule is left in original form as it may have some significance for those spouses who come to Canada from a foreign country. If adapted to the inter-provincial conflicts situation it takes on the same meaning as rule (ii).

I9. Hague Convention op. cit., Article 4. [It is interesting to note that the Draft Convention employed the formulation ...."the internal law of the [State] where both spouses establish habitual residence immediately after marriage". (emphasis added) This might be thought to lead into the same sort of difficulties as Cheshire's intended matrimonial home doctrine. The Convention's formulation seems more efficacious.]

20. Hague Convention op. cit., Article 4

2I. Report on the Draft op. cit., at I2.

22. Hague Convention op. cit., Article 7.

23. Report on the Draft op. cit., at I5.

24. ibid., at I6.

25. Hague Convention op. cit., Article 3.

26. If no proof of foreign law is lead then the court will, of course, apply its own law to the case. This point is related to the one made below which is that it may not matter too much, when inter-provincial conflicts are concerned, by which system the property is shareable.

27. Alberta's Report of the Institute of Law Reform and Research op. cit., Draft Bill, Section I7 (I). Manitoba L.R.C. report op. cit., at I28, Ontario Bill No. 6, op. cit., Section 4.

28. Report on the Draft op. cit.,at 3I.

29. i.e. section (iii) (a).

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Anton v. Bartolo, Clunet (1891) 1171

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Attorney-General of Canada v. Attroney-General of Ontario [1937] A.C. 326 (J.C. P.C.), [1937] 1 D.L.R. 673

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Jutras, Re [1932] 2 W.W.R. (Sask. C.A.)

Klaukie's Will, Re (1873) 1 B.C.R. (Pt. I) 76

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Murdoch v. Murdoch [1975] 1 S.C.R. 423, (1974) 1 W.W.R. 361

Parsons, Re (1926) 29).W.N. 430

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R. v. Edgehill [1963] 1 Q.B. 593

Radwan v. Radwan [1972] 3 W.L.R. 930

Rathwell v. Rathwell (1974) 14 R.F.L. 297 (Sask. Q.B.)

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